(11)

No. 96-976-CFY
Status: GRANTED

Title: John Hudson, Larry Baresel, and Jack Butler Rackley, Petitioners
v.
United States

Docketed:
December 18, 1996

Court: United States Court of Appeals for the Tenth Circuit

See also:
96-1299

Counsel for petitioner: Rothbaum,Bernard J.

Counsel for respondent: Solicitor General

40 printed copies ea. pet & appd 121896 counsel's name is corr as above

Entry	Date	Note	Proceedings and Orders
1	Dec 17 1996	G	Petition for writ of certiorari filed. (Response due February 18, 1997)
2	Dec 17 1996		Appendix of petitioner filed.
4	Jan 8 1997		Order extending time to file response to petition until February 18, 1997.
5	Feb 13 1997		Brief of respondent United States filed.
6	Feb 26 1997		DISTRIBUTED. March 14, 1997 (Page 14)
7	Mar 26 1997		REDISTRIBUTED. April 11, 1997 (Page 12)
8	Apr 14 1997		Petition GRANTED. SET FOR ARGUMENT October 8, 1997. **********
10	May 12 1997		Order extending time to file brief of petitioner on the merits until June 26, 1997.
12	Jun 25 1997		Joint appendix filed.
13	Jun 25 1997		Brief of petitioners John Hudson, Larry Baresel and Jack Rackley filed.
11	Jun 26 1997		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
14	Jun 26 1997		Brief amicus curiae of Washington Legal Foundation filed.
16	Jul 15 1997		Order extending time to file brief of respondent on the merits until August 26, 1997.
17	Jul 28 1997		CIRCULATED.
18	Aug 20 1997		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Tenth Circuit.
19	Aug 26 1997	X	Brief of respondent United States filed.
20	Aug 26 1997	X	Brief amici curiae of 48 States and Territories filed.
21	Aug 29 1997	D	Motion of Ohio, et al. for leave to participate in oral argument as amici curiae filed.
22	Sep 24 1997	X	Reply brief of petitioner John Hudson, Larry Baresel and Jack Rackley filed.
23	Sep 29 1997		Motion of Ohio, et al. for leave to participate in oral argument as amici curiae DENIED.

SUPREME COURT, U.S.
FILED

(1)

96 976 DEC 17 1996

No. ——

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JOHN HUDSON, LARRY BARESEL, and
JACK BUTLER RACKLEY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

C. MERLE GILE
2200 N. Classen Boulevard
2000 Citizen's Tower
Oklahoma City, OK 73106

JAMES A. ROLFE
2821 Routh Street
Dallas, TX 75201

LYNN PRINGLE
PRINGLE & PRINGLE
4101 N. Classen Boulevard
Oklahoma City, OK 73118

JACK L. NEVILLE, JR.
BERNARD J. ROTHBAUM *
LINN & NEVILLE, P.C.
1200 Bank of Oklahoma Plaza
201 Robert S. Kerr Avenue
Oklahoma City, OK 73102
(405) 239-6781
Counsel for Petitioners

*Counsel of Record

December 17, 1996

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

20 pp

QUESTIONS PRESENTED

1. Whether imposition upon petitioners of monetary fines as *in personam* civil penalties by the Department of the Treasury, together with other sanctions, is "punishment" for purposes of the Double Jeopardy Clause of the Fifth Amendment?

2. Whether such fines may be justified by reference to the "costs of investigation" allegedly incurred by the regulatory agency which assessed them when:

   (a) the statute pursuant to which the sanctions were assessed contains specific criteria for imposing fines and does not authorize consideration of "investigatory costs";

   (b) no agency of government contends it was a victim of the conduct for which fines were imposed; and

   (c) "costs of investigation" were not considered by the agency assessing the fines in determining whether to impose the fines or the amount thereof?

3. Whether the Court should grant review of the judgment below to resolve the express conflict between the opinion of the Tenth Circuit in this case and the opinion of the Seventh Circuit in *S.A. Healy Co. v. Occupational Safety and Health Review Commission*, 96 F.3d 906, 909-10 (7th Cir. 1996) with regard to the questions presented?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. ——

JOHN HUDSON, LARRY BARESEL, and JACK BUTLER RACKLEY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

The petitioners, John Hudson, Larry Baresel and Jack Butler Rackley, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on August 8, 1996 of which rehearing was denied on September 20, 1996.

OPINIONS BELOW

The opinion of the court of appeals of which review is sought, *United States v. Hudson, ("Hudson II")* is reported at 92 F.3d 1026, and is reprinted in the appendix hereto, app., pp. 1a-8a.

The previous opinion of the court of appeals *("Hudson I")* is reported at 14 F.3d 536, and is reprinted at app., pp. 69a-81a.

The opinion of the district court dismissing the indictment against petitioners on the authority of *Hudson I*, is reported at 879 F. Supp. 1113 (W.D. Okla. 1995) and is reprinted at app., pp. 9a-14a. The previous opinion of the district court is unreported and is reprinted at app., pp. 82a-88a.

JURISDICTION

Petitioners [1] were indicted in the United States District Court for the Western District of Oklahoma for alleged misapplication of the funds of three Oklahoma banks, and for conspiracy to misapply such funds. Petitioners moved to dismiss the indictment on the ground that it was barred by the Double Jeopardy Clause of the Fifth Amendment in light of the previous imposition of monetary fines and other sanctions upon petitioners for the same alleged conduct. The district court denied petitioners' motions to dismiss, app., pp. 82a-88a. Petitioners timely appealed. The court of appeals affirmed the district court as to the non-monetary sanctions, but reversed and remanded for further proceedings as to the fines. *United States v. Hudson*, 14 F.3d 536 (10th Cir. 1994), app., pp. 69a-81a.

On remand, the district court, following an evidentiary hearing, granted petitioners' motions to dismiss the indictment. *United States v. Hudson*, 879 F. Supp. 1113 (W.D. Okla. 1995), app., pp. 9a-14a.

The government appealed. On August 8, 1996, a differently constituted panel of the court of appeals again reversed the district court and, on this occasion, ordered the indictment against petitioners reinstated. *United States v. Hudson*, 92 F.3d 1026 (10th Cir. 1996), app., pp. 1a-8a.

[1] All parties to this proceeding are shown in the caption.

Petitioners timely filed a petition for rehearing and a suggestion of rehearing *en banc* both of which the court of appeals denied on September 20, 1996. App., pp. 18a-19a.

The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).[2]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb". The statutory provisions involved are 12 U.S.C. §§ 93(b), 504 and 1818(e) and (i) and 18 U.S.C. §§ 371, 656, 1005 and 2. These provisions are reprinted at app., pp. 144a-199a.

STATEMENT OF THE CASE

A. The Administrative Sanction Proceedings Against Petitioners

In the early 1980's, John Hudson, an attorney and member of the Oklahoma bar, became chairman of the board and controlling shareholder of several small Oklahoma banks. Larry Baresel, Mr. Hudson's law partner, and Jack Butler Rackley became officers or directors of one or more of the banks acquired by Mr. Hudson.

In 1986 and 1987 the Department of the Treasury, through the Office of the Comptroller of the Currency ("OCC"), issued Reports of Examination ("ROA's") of the banks which Mr. Hudson controlled. The ROA's were highly critical of Mr. Hudson, Mr. Baresel and Mr. Rackley with regard to certain loans made by these banks which were alleged to have violated federal statutory proscriptions regarding "insider" or "nominee" lending.

[2] On November 5, 1996, the district court stayed all proceedings pending disposition of this petition for a writ of certiorari. App., pp. 15a-17a.

In 1989, OCC initiated two adversary proceedings against petitioners. In one proceeding, styled an "assessment of civil money penalty", OCC sought to impose "assessments" (fines) of $100,000 against Mr. Hudson and $50,000 each against Mr. Baresel and Mr. Rackley pursuant to 12 U.S.C. §§ 93(b) and 504. App., pp. 89a-98a. In the second proceeding, styled an "intention to prohibit further participation", OCC sought to prohibit petitioners from participating "in any manner" in the affairs of any financial institution having deposits insured under any program of federal deposit insurance pursuant to 12 U.S.C. § 1818(e) and (i). App., pp. 99a-128a.[3] Both types of penalties were assessed on account of petitioners' alleged personal violations of federal statutes prohibiting "insider" or "nominee" lending transactions. (*Id.*) The "notice of assessment of a civil money penalty" issued against petitioners stated that the money penalties against petitioners were being imposed "pursuant to 12 U.S.C. §§ 93(b) and 504 for asserted violations of 12 U.S.C. §§ 84 [and] 375(b)" and that the amount of the money penalties imposed had been determined based upon, *inter alia*, "the gravity of the violations [asserted against petitioners and] the history of previous violations. . . ." App., p. 89a.

The "notice of intention to prohibit further participation" issued against petitioners stated that it had been issued pursuant to 12 U.S.C. § 1818(e) because OCC was "of the opinion that [petitioners had] engaged in conduct or practice with respect to [designated federally chartered banking institutions] which resulted in substantial financial loss or other damage" to such financial institutions and had evidenced "personal dishonesty and a willful and continuing disregard for such banks' safety and soundness. . . ." App., pp. 99a-100a (Mr. Hudson);

[3] Certain provisions of these statutes have been amended since 1989. The amendments do not affect the questions presented for review.

pp. 109a-110a (Mr. Baresel); pp. 119a-120a (Mr. Rackley).

All sanctions imposed were, thus, based upon the asserted gravity and magnitude of petitioners' alleged violations of federal law and upon the amount of loss which OCC asserted these violations had caused the banking institutions involved. OCC did not assert any loss or injury to any agency of the government as a result of petitioners' alleged violations of law.[4]

Following negotiations with the government, petitioners, without admitting or denying any of the underlying allegations (app., pp. 29a-31a), consented to entry of orders requiring them to pay reduced fines and to not participate in any manner in the conduct of the affairs of any insured depository institution, savings association or credit union. App., pp. 129a-143a.[5]

B. The Indictment Of Petitioners And The Initial Opinion Of The District Court

In 1992, petitioners were indicted for the same alleged "insider" lending transactions. Petitioners moved to dismiss the indictment on the ground it was barred by the Double Jeopardy Clause of the Fifth Amendment. Petitioners asserted that the previous imposition of fines and non-participation sanctions precluded prosecution by indictment for the same transactions under *United States v. Halper*, 490 U.S. 435 (1989). The district court denied

[4] As discussed *infra*, the district court found as a fact that "injury to the government" was not "considered by OCC in considering the amount of the penalties to be imposed" upon petitioners. *United States v. Hudson*, 879 F. Supp. at 1115-16, app., pp. 13a-14a. That finding was neither challenged by the government nor disturbed by the court of appeals.

[5] There has been no challenge to the finding of the district court that the reduction in the amount of the fines imposed upon petitioners was not "related to an assessment of government losses." (*Id.*, at 1116, app., p. 14a).

the motions to dismiss in an unpublished order. App., pp. 82a-88a. Petitioners timely appealed.

C. The First Opinion Of The Court Of Appeals

In its first opinion considering petitioners' double jeopardy claims (*Hudson I*), the court of appeals agreed with the district court that the non-participation sanctions imposed upon petitioners did not constitute "punishment" for purposes of the Fifth Amendment. With regard to the monetary fines, however, the Tenth Circuit reached a different conclusion. *Hudson I* held that the monetary sanctions appeared, *prima facie*, "to be designed, at least in part, to punish and deter improper conduct." (14 F.3d at 543, app., p. 81a).

Hudson I stated the fines imposed upon petitioners would constitute " 'punishment' for purposes of double jeopardy analysis" unless they were determined to be " 'solely remedial', i.e., not serving deterrent or retributive ends." *Id.*, at 540, app., p. 80a.

The court of appeals remanded petitioners' cases to the district court for further fact finding. The district court was instructed to "determine the precise injury caused to the government for which the sanctions are the remedy. . . ." *Id.* If the district court determined that the sanctions imposed upon petitioners were not "solely remedial", it was instructed to dismiss the indictment. 14 F.3d, at 543; app., p. 81a.

D. The Opinion Of The District Court On Remand

Folowing remand from the court of appeals, the district court conducted an evidentiary hearing into the nature of the fines which have been imposed upon petitioners by the government. App., pp. 20a-68a.

The government's own evidence established that the fines had been imposed upon petitioners in order to serve as a deterrent to similar violations by petitioners and by

other persons similarly situated. The government's evidence also established that the amount of the fines imposed had been predicated upon a "penalty matrix". App., p. 13a. The "matrix" uses "points" to determine the severity of the sanction to be imposed in a fashion indistinguishable from the "matrix" of "points" employed in the Sentencing Guidelines promulgated by the United States Sentencing Commission. *See, Nichols v. United States*, 511 U.S. 738, 744 & nn. 2-3 (1994).

The factors considered are willfuness, number and duration of violations, concealment of violations and existence of prior violations.

The district court concluded that petitioners had been sanctioned by the government in order to prevent them " 'from ever reentering the banking industry and, through publicity of these actions, hopefully deter other individuals from similar conduct'."

The district court also found:

> The evidence also reflects that . . . when determining the amount of the penalty . . . the factors considered included intent, number of violations and concealment of violations. Injury to the government was not listed as a factor . . . [and] the evidence before the Court does not indicate that injury to the government was considered. . . .

879 F. Supp., at 1115-16, app., pp. 13a-14a.

The district court observed that while petitioners had negotiated a reduction in their fines, "no evidence suggests the reduction was related to an assessment of government losses." *Id.*

Indeed, the government concededly suffered no "loss" in the sense of parting with money or any other thing of value. OCC itself noted that all loan losses allegedly

resulting from petitioners' acts were borne by the lending banks.[6]

The district court acknoweldged that the government asserted that OCC had incurred "investigative costs" of approximately $72,000. There is, however, no statutory authority allowing OCC to collect "investigative costs" or to consider such "costs" in determining whether to impose monetary sanctions, and OCC acknowledged that it had not done so in imposing fines upon petitioners. App., p. 13a-14a.

These "costs" were, in fact, merely an arbitrary fraction of the salaries paid in the ordinary course to OCC employees who had been assigned to the investigation of petitioners. App., pp. 38a-39a.[7] The idea of claiming a fraction of salaries paid to OCC employees as a "cost" attributable to petitioners originated with the Assistant U.S. Attorney who was preparing for the hearing before the district court. (*Id.*, app., pp. 38a-39a).[8] In any event, the district court found as a fact that "the record contains no indication that these costs were considered by the [government] in determining the recommended fines. . . ." After considering this evidence, the district court concluded that "the fines were punitive for double jeopardy purposes." 879 F. Supp., at 1116, App. p. 14a. Accordingly, consistent with the mandate of *Hudson I*, the district court ordered the indictment dismissed.

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[6] OCC alleged the losses were incurred by the First National Banks of Tipton and Hammon, Oklahoma. App., p. 97a. Petitioners strongly dispute the allegation. The point is, on OCC's own version of events, the losses did not fall upon the government.

[7] The OCC representative who testified before the district court stated that he "took [my] salary and divided it by what I thought was the percentage of time that I had spent on the case. . . ." App., p. 89a.

[8] The OCC representative did not even know "why he [the Assistant U.S. Attorney] wanted [the information]." App., p. 38a.

E. The Second Opinion Of The Court Of Appeals

On the government's appeal, a differently constituted panel of the court of appeals again reversed the district court. *Hudson II*, 92 F.3d 1026, app., pp. 1a-8a. *Hudson II* summarily held that "there was no gross disproportionality between the total fines imposed [upon petitioners], $44,000, and the proven damages to the government, $72,000." 92 F.3d, at 1029; app., p. 4a. This holding was, as the district court which heard the evidence had stated, contrary to the government's own evidence on both points mentioned.

First, the total fines imposed upon petitioners were $100,000 upon Mr. Hudson and $50,000 upon both Mr. Baresel and Mr. Rackley. Although these fines were subsequently reduced, in the words of the district court, "the evidence reflects that the reduction was based upon the defendants' respective financial circumstances." 879 F. Supp., at 1116; app., p. 14a.

Second, the $72,000 figure was not contended by OCC to constitute "damages". Rather, it was said to be "costs" concededly derived by simply ascribing to petitioners a fraction of salaries paid to OCC employees involved in the investigation of petitioners.

The Tenth Circuit did not mention the fact that there was no statutory authorization for imposing such "costs" upon petitioners or the fact that any losses attributable to petitioners' alleged violation of federal banking statutes would fall upon the banks involved rather than any agency of the government. Nor did the court mention that the banks which OCC asserted had been injured would not receive any portion of the fines imposed.[9]

Instead, the court stated, since the money sanctions were not "overwhelmingly disproportionate" to the gov-

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[9] The fines were ordered to be paid to the United States Treasury. App., p. 180a.

erment's "damages", they were "remedial" as a matter of law.

The court deemed irrelevant OCC's concession that it had not considered this issue in determining the amount of petitioners' fines. Indeed, the court held that the "intent" which motivates a governmental agency to impose fines, or other sanctions, has no bearing on the question whether "punishment" is involved. 92 F.3d, at 1029, app., p. 6a. On this basis, the court of appeals—without questioning the factual findings made by the district court—reversed its judgment.

Petitioners' petition for rehearing, and suggestion of rehearing *en banc*, were denied. Petitioners seek review in this Court.

REASONS FOR GRANTING THE WRIT

I. The Holding Of The Tenth Circuit That *In Personam* Civil Penalties Imposed For The Purpose Of Deterrence May Be Deemed "Remedial" By Reference To Consideration Of "Investigative Costs" Is Contrary To Decisions Of This Court And Conflicts With Decisions Of Other Courts Of Appeals.

Perhaps the most compelling reason for granting review of the decision of the Tenth Circuit was stated by the Seventh Circuit in explaining why the latter refused to follow it, even though this resulted in a conflict among the circuits on an important question of constitutional law: the holding of the Tenth Circuit distorts Double Jeopardy Clause jurisprudence beyond recognition by confusing the very distinct concepts of providing a remedy to the government when it has suffered an injury and providing compensation to the government when it is simply investigating alleged violations of law. In the words of Judge Easterbrook:

> Although recovery of the costs of investigating . . . from [the target of the investigation] may be *compensatory*, in the sense that the United States then breaks even in the business of prosecuting wrongdoers, it cannot be *remedial*, because the United States is not the injured party, and the fine produces no benefit for those who were injured—except through general and specific deterrence, the standard objectives of the criminal law.

S.A. Healy Co. v. Occupational Safety and Health Review Commission, 96 F.3d 906, 910 (7th Cir. 1996) (emphasis original).[10]

The Seventh Circuit added that, were the view advocated by the government in *Healy*—and endorsed by the Tenth Circuit—accepted, "there is not much left of the double jeopardy clause." *Id.*

Nor would there be much left of the opinions of this Court in *United States v. Halper*, 490 U.S. 435 (1989) and *Montana Department of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994).

Halper involved the False Claims Act. The "false claims" with which the Act is concerned are false claims knowingly made to an officer or agency of the United States in order "to get a false or fraudulent claim paid or approved" for payment *from the Treasury*. 31 U.S.C. § 3729(a). In any such case, the government is itself the victim of fraudulent conduct and the wrongdoer's gain is always at least equaled by the government's loss.

Congress has directed that, in such cases, the United States should be provided with the remedy of double damages, a $2,000 penalty and costs of suit. The *Halper* Court was careful to note that

> the *remedial* provision of the Act state[s] that a person in violation 'is liable to the United States government for a civil penalty of $2,000, an amount equal

[10] The Seventh Circuit noted that "[b]ecause this opinion creates a conflict among the circuits, it was circulated before release to all judges in active service. . . . A majority did not favor a hearing *en banc*. . . ." 96 F.3d, at 911, n.*

to two times the amount of damages the government sustains because of the act of that person, and costs of the civil action'.

Halper, 490 U.S. at 438 (*quoting*, 31 U.S.C. § 3729; emphasis supplied). In a case such as *Halper* there is no doubt that the government is entitled to be "made whole" —making the government "whole" is the animating purpose underlying the statute.

The question in *Halper* was, therefore, one of degree: after a criminal prosecution has been completed, at what point in a separate civil action does the $2,000 penalty for each false claim become punitive? The Court's answer—when collecting additional money from the defendant is no longer "rationally related to the goal of making the Government whole" (*Id.*, at 451)—is simply irrelevant in a case in which the government is not itself the victim of the alleged misconduct and the fines imposed do not inure to the party who allegedly incurred a loss. This diametric difference, and its importance to Double Jeopardy Clause analysis, is illustrated by *Kurth Ranch*. There, the Court rejected the claim that the tax at issue was remedial because, *inter alia*, "the formula by which [the State] computed the tax assessment would have been the same . . . regardless of whether it suffered any harm at all." 511 U.S. 767, ——; 114 S.Ct. 1937, 1948.

As the Seventh Circuit recognized in *Healy* (and as the Tenth Circuit had itself recognized in its first opinion in petitioners' cases), the relevant inquiry for Double Jeopardy Clause analysis "is not whether [a] statute is designed to serve a remedial or otherwise beneficent purpose, but whether it achieves this end by the imposition of punitive sanctions". *Healy, supra*, at 911. *Accord, Hudson I*, 14 F.3d, at 542. When, as in petitioners' cases, the government does not even contend it is a victim of wrongdoing but, nevertheless, imposes *in personam* fines for the stated purpose of deterring alleged misconduct,

the sanctions constitute punishment. The contrary holding of the court below is inconsistent with *Halper* and *Kurth Ranch*; has now been expressly rejected by the Seventh Circuit; and should be reviewed by this Court.

The completeness of the conflict between the decision below and the decision of the Seventh Circuit in *Healy* is emphasized by the differing treatment which those courts gave to the decision of the Sixth Circuit in *United States v. WRW Corp.*, 986 F.2d 138 (6th Cir. 1993) (criminal and civil fines, separately assessed, imposed under the Federal Mine Safety and Health Act) and the Seventh Circuit's own previous decision in *United States v. Furlett*, 974 F.2d 839 (7th Cir. 1992).

The court below endorsed both decisions and relied upon them as authority for its holding. 92 F.3d, at 1029-30, app., pp. 7a-8a.

By contrast, *Healy* observed that *WRW* had dismissed this Court's decision in *Halper* as "an insignificant blip". 96 F.3d, at 910. But, the Seventh Circuit wrote, *United States v. Ursery*, —— U.S. ——, 116 S.Ct. 2135 (1996) "shows that *Halper* displaced older approaches and is now the point of reference. . . . We think that the sixth circuit's [decision in *WRW*] is inconsistent with *Ursery*". *Id.* As to *Furlett*, the Seventh Circuit observed that the respondent in that case had "conceded this issue" while *Healy* contested it, "and now that the issue is squarely presented we hold that under *Halper* a fine can be punishment even though it is less than the costs of investigation and prosecution." *Id.*

The conflict between the decision of the Tenth Circuit below and the decision of the Seventh Circuit in *Healy* is, in a word, absolute.

II. The Holding Of The Tenth Circuit That A Civil Fine Can Be Deemed "Remedial" By Reference To "Costs Of Investigation" Even Though Consideration Of Such Costs Is Neither Authorized By Statute Nor Undertaken By The Agency Imposing The Fines Is Contrary To Decisions Of This Court And Conflicts With The Decisions Of Other Circuits.

The statutes under which petitioners were sanctioned contain no authorization to consider the government's "costs" in determining whether fines should be imposed or the amounts of any such fines. The factors which OCC is authorized by statute to consider, and which it in fact considers, in imposing fines—duration and seriousness of the alleged violations, history of previous violations and ability to pay—all relate to the stated goal of deterrence, not to providing recompense to the government. As petitioners noted above, OCC readily acknowledged this point before the district court and acknowledged also that no attempt was made to even approximate "costs of investigation" until the idea was suggested to OCC by the government attorney preparing for the evidentiary hearing ordered by the court of appeals in *Hudson I*.

Yet in *Hudson II*, the court of appeals transformed government counsel's *post hoc* suggestion to OCC regarding "costs of investigation" into "proven damages [*sic*] to the government [of] $72,000." 92 F.3d, at 1028, app., p. 4a. These "proven damages" rendered the fines "remedial" without regard to the fact that the supposed "damages" were simply fractions of salaries of OCC employees who were involved in the agency's investigation of petitioners; without regard to the fact that no statute authorizes OCC to consider such costs in imposing fines; and without regard to the fact that OCC did not do so.

The principal authority relied upon by the court below was *United States v. Bizzel*, 921 F.2d 263 (10th Cir. 1990). *Bizzel*, however, only reinforces the importance of the distinction, emphasized in *Healy* and ignored below,

between a monetary sanction which is remedial and one which is not. The defendant in *Bizzel* had previously paid a money sanction as a remedy for fraud which caused *direct* monetary injury to an agency of the government, the Department of Housing & Urban Development ("HUD"). Indeed, the lead offense charged in *Bizzel* was "conspiracy to *defraud the United States* and HUD." 921 F.2d at 265 (emphasis supplied).

The similarity to, and irreconcilable conflict between, the holding below and the holding of the Seventh Circuit in *Healy* on this significant constitutional issue is truly striking. Like the Tenth Circuit, the Seventh Circuit confronted a monetary fine imposed under a statute containing "specific criteria, none of which concerns the costs of investigation and prosecution". 96 F.3d, at 910. In contrast to the decision below, the *Healy* court held that such a fine is "[a] penalty designed to deter wrongdoing [and] is punishment." *Id.*, at 910-911.

No decision of this Court and, so far as we are aware, no reported decision of any lower federal court other than the decision of which review is here sought, suggests that the government's "costs of investigation" can render an *in personam* civil fine "remedial" when consideration of such costs is neither authorized by statute nor undertaken by the agency imposing the fines. The decision of the Tenth Circuit is inconsistent with controlling decisions of this Court and in direct conflict with the decision of the Seventh Circuit in *Healy*. For both reasons, it should be reviewed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

C. MERLE GILE
2200 N. Classen Boulevard
2000 Citizen's Tower
Oklahoma City, OK 73106

JAMES A. ROLFE
2821 Routh Street
Dallas, TX 75201

LYNN PRINGLE
PRINGLE & PRINGLE
4101 N. Classen Boulevard
Oklahoma City, OK 73118

JACK L. NEVILLE, JR.
BERNARD J. ROTHBAUM *
LINN & NEVILLE, P.C.
1200 Bank of Oklahoma Plaza
201 Robert S. Kerr Avenue
Oklahoma City, OK 73102
(405) 239-6781
Counsel for Petitioners

*Counsel of Record

December 17, 1996

FILED

96 976 DEC 17 1996

OFFICE OF THE CLERK

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JOHN HUDSON, LARRY BARESEL, and
JACK BUTLER RACKLEY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

C. MERLE GILE
2200 N. Classen Boulevard
2000 Citizen's Tower
Oklahoma City, OK 73106

JAMES A. ROLFE
2821 Routh Street
Dallas, TX 75201

LYNN PRINGLE
PRINGLE & PRINGLE
4101 N. Classen Boulevard
Oklahoma City, OK 73118

JACK L. NEVILLE, JR.
BERNARD J. ROTHBAUM *
LINN & NEVILLE, P.C.
1200 Bank of Oklahoma Plaza
201 Robert S. Kerr Avenue
Oklahoma City, OK 73102
(405) 239-6781
Counsel for Petitioners

*Counsel of Record

December 17, 1996

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 95-6030

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

JOHN HUDSON; LARRY BARESEL; JACK B. RACKLEY,
Defendants-Appellees.

Aug. 8, 1996

Before TACHA, LOGAN and REAVLEY,* Circuit Judges.

REAVLEY, Circuit Judge.

The United States appeals the dismissal on double jeopardy grounds of its criminal indictment against John Hudson, Larry Baresel, and Jack B. Rackley ("defendants" or "appellees"). Prior to being indicted the defendants had been fined by the Office of the Comptroller of the Currency ("OCC"). The defendants moved to dismiss the indictment for violating the "multiple punishments" prong of the Double Jeopardy Clause.[1] The district court granted

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* The Honorable Thomas M. Reavley, United States Court of Appeals, Fifth Circuit, sitting by designation.

[1] The Double Jeopardy Clause of the Fifth Amendment provides: "[N]or shall any person be twice put in jeopardy of life or limb. . . ." U.S. Const. Amend. V. The Double Jeopardy Clause protects against three abuses: (1) a second prosecution for the same of-

the motion, concluding that the OCC fines were punishment for the same offenses charged in the indictment. Because we find that the fines were not punitive, we reverse and remand for further proceedings.

PROCEDURAL HISTORY

In 1989, the OCC issued civil penalties against the appellees for alleged banking violations.[2] The OCC maintained that the violations caused approximately $900,000 in losses to the Federal Deposit Insurance Corporation, and ordered Hudson to pay $100,000 and Rackley and Baresel to pay $50,000 each. The OCC also issued orders ("prohibition orders") which in essence sought to prohibit appellees from all banking activities.

As a resut of the then pending administrative actions against them, the appellees and the OCC entered into agreements ("consent orders") in which Hudson consented to pay $16,600 and Rackley and Baresel consented to pay $15,000 each. The appellees also agreed not to participate in most, if not all, banking activities without prior authorization from the government. In addition, each consent order contained a provision ("waiver provision") stating that nothing in the consent order constituted a waiver of any right the government had to bring other actions against the appellee. Hudson's and Baresel's consent orders each contained a provision stating that the order "does not constitute an admission" by either "to any of the charges contained" in the OCC's notices.

After the government indicted the defendants for the same transactions upon which the OCC sanctions were

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fense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) the imposition of multiple punishments for the same offense. *United States v. Halper*, 490 U.S. 435, 440, 109 S.Ct. 1892, 1897, 104 L.Ed.2d 487 (1989).

[2] The civil penalties were imposed pursuant to 12 U.S.C. §§ 93(b) and 504 for alleged violations of 12 U.S.C. §§ 84 and 375b, and of 12 C.F.R. §§ 31.2(b) and 215.4(b).

based, the defendants moved to dismiss the indictment. The district court initially denied the motion, ruling that the waiver provision was a valid waiver of the defendants' double jeopardy claim, and that the fines and nonparticipation sanction were solely remedial. The defendants appealed, and a prior panel of this court reversed in part, affirmed in part, and remanded for further proceedings. *See United States v. Hudson*, 14 F.3d 536 (10th Cir. 1994) ("*Hudson I*").

Hudson I first determined that the waiver provision did not constitute a waiver of the defendants' double jeopardy rights. *Id.* at 539. The court then affirmed that the prohibition order was remedial and therefore did not violate the Double Jeopardy Clause. *Id.* at 540-42. The court concluded, however, that there was insufficient evidence in the record to sunpport the district court's determination that the money sanctions were solely remedial, pointing out that the district court made no findings regarding actual losses the government incurred. *Id.* at 543. The court therefore vacated the district court's decision on the money sanctions remanded for further proceedings.

On remand the district court conducted an evidentiary hearing and found that the government's proven costs were the $72,000 the OCC spent pursuing the defendants, but concluded that the OCC monetary sanctions against the defendants were not solely remedial. The court found that the fines were imposed for the same offenses charged in the indictment, and held that the indictment violated the Double Jeopardy Clause.

ANALYSIS

The only issue we need to address on this appeal is whether the district court erred in determining that the monetary sanctions were not solely remedial.[3] We review

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[3] Because we reverse the case on this issue, we do not address whether the monetary sanctions were imposed for the same offenses charged in the indictment.

the district court's determination for abuse of discretion. *United States v. Halper*, 490 U.S. 435, 450, 109 S.Ct. 1892, 1902, 104 L.Ed.2d 487 (1989); *United States v. Bizzell*, 921 F.2d 263, 267 (10th Cir.1990).

Hudson I acknowledged that the case is controlled by *Halper*, which considered when a civil sanction may be considered punishment for double jeopardy purposes.[4] Under the objective test outlined in *Halper*, a particular sanction is not punishment when it bears a rational relation to the goal of compensating the government for its loss. *Halper*, 490 U.S. at 449-51, 109 S.Ct. at 1902-03 The defendant in *Halper* had overbilled the government $585 by submitting 65 false claims. He was convicted in a criminal case and received a $5,000 fine. The government then brought a civil action under the False Claims Act, seeking civil penalties of over $130,000, based on the Act's provision for a civil penalty of $2000 per false claim submitted. The Court held that the fine was grossly disproportionate to the damage caused, and was therefore a punishment. The Court emphasized that its ruling was "a rule for the rare case," *id.* at 449, 109 S.Ct. at 1902, where the civil penalty is "exponentially greater than the amount of the fraud," *id.* at 445, 109 S.Ct. at 1900, and is "so extreme and so divorced from the Government's damages," *id.* at 442, 109 S.Ct. at 1898, that it could only be characterized as punishment under the Double Jeopardy Clause.

In the case at bar there was no gross disproportionality between the total fines imposed, $44,000, and the proven damages to the government, $72,000.

[4] The recent Supreme Court case of *United States v. Ursery*, —— U.S. ——, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996), reaffirms that *Halper* controls the case at bar. In *Ursery*, the Supreme Court distinguished between cases involving civil fines and sanctions, which may constitute punishment under *Halper*, and in rem civil forfeitures, which are neither punishment nor criminal for double jeopardy purposes. *Id.* at ——. 116 S.Ct. at 2141-44. Because the case at bar involves civil fines and sanctions. *Halper* controls.

In *United States v. Bizzell*, 921 F.2d 263 (10th Cir. 1990), we held that a fine is not punishment unless it is overwhelmingly disproportionate to the government's damages. *Id.* at 267. In *Bizzell*, the Department of Housing and Urban Development ("HUD") filed administrative complaints against Charles and John Bizzell. The Bizzells entered into settlement agreements with HUD. Both agreements prohibited the Bizzells from participating in HUD programs for a short period,[5] and John Bizzell agreed to pay a $30,000 sanction. When the government subsequently indicted the Bizzells for the same transactions set forth in the HUD administrative complaint, both defendants moved to dismiss the indictment on double jeopardy grounds. The district court ruled that the prohibitions were remedial, but concluded that the monetary sanction was a punishment because it bore no relation to a remedial goal. *Id.* at 265. This court agreed that the prohibitions were remedial, but concluded that the monetary sanction was a punishment. *Id.* at 266.

The *Bizzell* court read *Halper* to state that "a civil remedy enacted by the government does not rise to the level of proscribed 'punishment unless 'in a particular case a civil penalty . . . may be so extreme and so divorced from the Government's damages and expenses as to constitute punishment.' " *Id.* (quoting *Halper*, 490 U.S. at 442, 109 S.Ct. at 1898); *see also Burke v. Board of Gov. of Federal Reserve System*, 940 F.2d 1360, 1367 (10th Cir.1991) ("[M]ultiple punishments exist for purposes of double jeopardy where 'a civil penalty [is] so extreme and so divorced from the Government's damages and expenses as to constitute punishment.' " (quoting *Halper*, 490 U.S. at 442, 109 S.Ct. at 1898)), *cert. denied* 504 U.S. 916, 112 S.Ct. 1957, 118 L.Ed.2d 559 (1992). In *Bizzell* we noted that under *Halper* the question is "whether the civil remedies can be fairly described as remedial," *Id.* at 267,

[5] John Bizzell was excluded for two years conditioned upon the payment of his fine and Charles for 18 months. *Id.* at 265

and then applied this objective test to the facts before it. The court held that the district court had abused its discretion by holding that the $30,000 sanction was punitive because "[t]he record simply does not suggest that the amount John Bizzell agreed to pay HUD was 'overwhelmingly disproportionate to the damages he caused.'" *Id.* at 267. The court found that the sanction served a remedial goal because "the government's losses attributable to John Bizzell far exceeded $30,000." *Id.*

Following that language in *Bizzell*, the record in the case at bar "simply does not suggest that the amount [the defendants] agreed to pay [the OCC] was 'overwhelmingly disproportionate to the damages [they] caused.'" And the sanctions can "fairly be characterized as remedial" because "the government's losses attributable to [the defendants] far exceeded [the amount of the fines imposed]."

If subjective intent of the administrative agency were determinative, we would have to conclude that the prohibition order, held to be remedial in *Hudson I*, was punishment, for undoubtedly the OCC hoped to deter future violations with that penalty also. It is worth stressing that the *Halper* test "constitutes an objective rule that is grounded in the nature of the sanction and the facts of the particular case. It does not authorize courts to undertake a broad inquiry into the subjective purposes that may be thought to lie behind a given judicial proceeding." *Halper*, 490 U.S. at 453, 109 S.Ct. at 1904 (Kennedy, J., concurring); *cf. Hicks v. Feiock*, 485 U.S. 624, 635, 108 S.Ct. 1423, 1431, 99 L.Ed.2d 721 (1988).

Cases in two other circuits are closely on point. In *United States v. Furlett*, 974 F.2d 839 (7th Cir.1992), an administrative law judge sanctioned two futures traders for various trading transgressions, stating "it is imperative that sanctions be levied against respondents to deter further illegal activity and to protect public customers for the type of insidious conduct described in this case." *Id.* at 841 (quoting *United States v. Furlett*, 781 F.Supp.

536, 538 (N.D.Ill.1991) (quoting the ALJ opinion)). In opposing the defendants' motion on double jeopardy grounds, the government introduced an affidavit delineating the expenses it had incurred in pursuing the traders. The district court concluded that the fines were remedial for two reasons: they were a form of disgorgement, and they were not overwhelmingly disproportionate to the government's costs incurred in pursuing the traders. *Furlett*, 974 F.2d at 842.

On appeal, the traders argued that the district court erred in upholding the ALJ's sanctions because the ALJ had not, in fact, considered the government's loss when he imposed the fine. *Id.* at 843. The appellate court rejected this argument, noting that *Halper* called for an objective inquiry. *Id.* at 844. The court reasoned that merely because the ALJ did not consider the government's loss when imposing the fine does not imply that the fine is not related to the government's loss. *Id.* at 843-44. The court held that the fines were remedial largely because they were not disproportionate to the damages caused to the government. *Id.* at 843.

In *United States v. WRW Corp.*, 986 F.2d 138 (6th Cir.1993), WRW corporation was assessed civil penalties of $90,350 for violations of safety standards under the Federal Mine Safety and Health Act.[6] The officers and directors of WRW were later indicted and convicted for these same violations, and they served prison sentences and paid criminal fines. After the United States brought an action to collect the civil fines that had been assessed against the corporation, the defendants moved to dismiss on double jeopardy grounds. Relying on *Halper*, they argued that the imposition of civil penalties promoted the aims of retribution and deterence, given the various factors

[6] Federal Mine Safety and Health Act of 1977, §§ 2 et seq., 110(a), (d), 30 U.S.C. §§ 801 et seq., 820(a), (d).

used to determine the amount of the civil penalty.[7] The court stated that these factors may as readily be ascribed to remedial as to punitive purposes, *id.* at 141-42, and emphasized that "the fact that the Government's expenses may not have been considered when assessing the amount of the penalty does not alter the objective conclusion by the trial court that the penalty assessed is rationally related to the goal of making the Government whole." *Id.* at 142 (citing *Furlett*, 974 F.2d at 843-44). The court then held that the fines were rationally related to the goal of making the government whole in large part because the civil fines were not excessive in relation to the United States' expenses incurred in the investigation and prosecution of the defendants' violations. *Id.* at 142.

CONCLUSION

Under *Bizzell* and *Halper*, we hold that it was an abuse of discretion for the district court to rule that the monetary sanctions were not solely remedial. The sanctions were rationally related to the government's damages. We therefore reverse the order granting the defendant's motion to dismiss and remand for further proceedings.

REVERSED AND REMANDED.

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[7] These factors included: the operator's history of previous violations, the size of the penalty versus size of the operator's business, whether the operator was negligent, the effect of the penalty on the operator's ability to remain in business, and the good faith of the operator to achieve rapid compliance after notification of a violation. *Id.* at 141, n. 1 (citing 30 U.S.C. § 820(i)).

APPENDIX B

UNITED STATES DISTRICT COURT
W.D. OKLAHOMA

No. CR-92-152-T

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN HUDSON, LARRY BARESEL, and
JACK BUTLER RACKLEY,
Defendants.

Dec. 16, 1994

ORDER

RALPH G. THOMPSON, District Judge.

Before the court is the motion of defendants John Hudson, Larry Baresel and Jack Butler Rackley to dismiss the August 1992 indictment for criminal law violations of 18 U.S.C. §§ 2, 371, 656 and 1005. Defendants were alleged to have violated those statutes by mismanagement and illegal operation of several banks. These violations were based on the same lending transactions which were the subject of prior administrative sanctions imposed against defendants by the Office of the Comptroller of the Currency ("OCC"). The OCC action culminated in the execution by defendants of a Stipulation and Consent Order ("Consent Order"), which, *inter alia*, prohibited defendants from future participation in banking activities and imposed monetary fines for alleged federal law violations.

Defendants moved to dismiss the indictment on the grounds that it constitutes punishment for the same con-

duct which was the subject of the Consent Order and there violated the double jeopardy clause. This court denied that motion, finding that the Consent Order contained a knowing and voluntary waiver of the defendants' double jeopardy claim. The court further found that, in any event, the sanction prohibiting participation in banking activities and the fines were not punitive measures encompassed by the double jeopardy clause.

Defendants appealed that decision to the Tenth Circuit Court of Appeals, which affirmed in part and reversed and remanded for further action. *United States v. Hudson,* 14 F.3d 536 (10th Cir.1994). The Tenth Circuit reversed the determination that the Consent Order included a waiver, but affirmed the decision that the prohibition against future participation in banking activities was not punitive. 14 F.3d at 539, 541. The Tenth Circuit reversed the decision that monetary sanctions were not punitive and, remanded the action for further consideration of the effect of the monetary fines. *Id.* at 542-43. The court has held an evidentiary hearing and the parties have submitted additional brief on the issues presented. The question before the court on remand is whether the Consent Order monetary sanctions and the indictment address the same conduct by defendants and, if so, whether the monetary sanctions imposed by the OCC are remedial or punitive.

Double jeopardy rights arise where an individual is punished twice for the same conduct or offense. The test to be applied to determine whether there are two offenses or only one is whether each provision "requires proof of an additional fact which the other does not." *Burke v. Board,* 940 F.2d 1360, 1367 (10th Cir.1991), *citing Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). If the same offense results in criminal punishment and civil money penalties,

multiple punishments exist for purposes of double jeopardy where "a civil penalty [is] so extreme and so divorced from the government's damages and expenses as to constitute punishment." *Burke,* 940 F.2d at 1367, *citing United States v. Halper,* 490 U.S. 435, 442, 109 S.Ct. 1892, 1898, 104 L.Ed.2d 487 (1989).

The OCC charged defendants with participating in a plan to have banks with which they were associated make nominee loans to nominal borrowers in a manner which allowed defendants to receive the benefit of the loans. The OCC asserted that this resulted in violations of the statutory restrictions regarding lending limits, those concerning loans to officers, directors or other controlling persons of banks, and the statutes requiring accurate recordation of loans on the books of national banks. The monetary sanctions were imposed by the OCC pursuant to the authority granted by 12 U.S.C. § 93(b) and 504, as well as 12 U.S.C. §§ 84 and 375a and 375b. In the indictment at issue, defendants are charged with, *inter alia,* violations of 18 U.S.C. § 656, which prohibits misapplication of bank funds. The government concedes that the violations which were the subject of the Consent Order and those charged in the indictment, are based on the same loan transactions. However, the government argues that different statutes are involved and, accordingly, different offenses are at issue for double jeopardy purposes. Defendants argue that, if the OCC proved the allegations which were the subject of a Consent Order, that same proof would also establish a violation of 18 U.S.C. § 656, the statute charged in the indictment.

A review of the evidence establishes that, for double jeopardy purposes, the Consent Order and the indictment involve the same conduct. As defendants correctly note, a violation of the statutes under which the OCC proceeded in the Consent Order necessarily encompasses a violation of 18 U.S.C. § 656. *United States v. Twiford,* 600 F.2d 1339, 1343-44 (10th Cir.1979). *See also United States v.*

Davis, 953 F.2d 1482, 1492 (10th Cir.1992). The broad range of conduct prohibited by 12 U.S.C. § 93(b) and § 504 necessarily encompasses the conduct which is the subject of 18 U.S.C. § 656. Furthermore, the same loan transactions are the subject of both the indictment and the Consent Order. As a result, this case is distinguishable from *Burke,* where the court determined double jeopardy was not violated because a cease and desist order addressed conduct occurring at a time different from that at issue in the challenged indictment. 940 F.2d at 1367.

Because the same conduct is addressed in the indictment and the Consent Order, the court must next determine whether the punishment imposed under the civil penalty is sufficient to invoke double jeopardy protection against the subsequent indictment. Double jeopardy does not apply where the civil penalty at issue is *solely* remedial, but applies if that penalty is also partially designed to punish. *Austin v. United States,* —— U.S. ——, ——, 113 S.Ct. 2801, 2802, 125 L.Ed.2d 488 (1993); *Hudson,* 14 F.2d at 540. It is not sufficient to show only that the statute authorizing the sanctions has a remedial purpose; rather, the sanctions themselves must be solely remedial. *Hudson,* 14 F.3d at 542. Furthermore, the government must identify the precise injury to the government which the sanction is designed to remedy and provide an accounting of the actual losses on which the sanctions are based. *Id.* If there is no injury to be remedied, the fines presumably were imposed to deter defendants from continued violations of the banking laws and, as a result, are punitive in nature. If there was an injury, then the fines must be imposed solely to remedy that injury to avoid double jeopardy. A civil penalty is generally punitive where it is overwhelmingly disproportionate to the damages caused. *United States v. Bizzell,* 921 F.2d 263, 267 (10th Cir. 1990), *citing Halper,* 490 U.S. at 449, 109 S.Ct. at 1902. However, a fine may be punitive even if it is reasonably related to the loss. *Hudson,* 14 F.3d at 543.

In this case, the government contends that the OCC fines were solely remedial. The evidence establishes that the OCC alleged the defendants collectively caused more than $900,000 in losses. Initially, the OCC recommended $100,000.00 civil penalty against Hudson and $75,000.00 penalties against both Baresel and Rackley. It also recommended prohibiting their future participation in banking. Daniel Stipano of the Enforcement and Compliance Division of the OCC testified that he endorsed that recommendation. In his recommendation, Stipano stated that the OCC could "accomplish a great deal by preventing these individuals from ever re-entering the banking industry and, through publicity of these actions, hopefully deter other individuals from similar conduct." Defendants's Exhibit 3, numbers 127-28. That conclusion was consistent with the OCC policy and procedures manual in effect at the time the penalties weer imposed in this case. The manual contains guidelines for sanctions, including civil money penalties. According to the manual, a civil money penalty can serve as a "deterrent to similar violations by the persons against whom the penalties are assessed and by other banks and bankers." The manual also provided that public disclosure of civil money penalties "may serve as a deterrent to future violations." Government Exhibit 21, pages 1, 3.

The evidence also reflects that the amount of the monetary penalties imposed on defendants was determined by use of the OCC "civil money penalty matrix." This was referred to as a "CMP matrix," and was used to determine the relative degree of severity of violations by assigning weight to certain factors which were to be considered when determining the amount of the penalty. Government Exhibit 21 at page 2. The factors considered included intent, number of violations and concealment of violations. Injury to the government was not listed as a factor on the CMP matrix. The evidence before the court does not indicate that injury to the government was considered by the OCC in deciding the amount of the penalties to be

imposed. Defendants' Exhibit 4. Mr. Stipano testified that the OCC did not have the legal authority to use its enforcement powers to compel officers and directors to make restitution under the statutory provisions in existence at the time the penalties were assessed.

The only evidence regarding government losses is that reflecting the OCC's investigative costs in this case which total approximately $72,000.00. However, the record contains no indication that these costs were considered by the OCC in determining the recommended fines by $100,000.00 against Hudson and $75,000.00 each against Baresel and Rackley. The total of these fines is also substantially greater than the investigative costs. Although the fines were subsequently reduced,[1] the evidence reflects that the reduction was based on the defendants' respective financial circumstances. No evidence suggests that the reduction was related to an assessment of government losses. The evidence establishes that the OCC monetary assessments against the defendants were not solely remedial. Assuming, *arguendo*, that these had some remedial purpose, the evidence establishes that they were at least partially designed to serve as a deterrent. Thus, the fines were punitive for double jeopardy purposes.

In accordance with the evidence before the court and the factors to be considered in determining whether double jeopardy is at issue, the indictment addresses the same conduct as the OCC Consent Order. Further, the monetary penalties imposed by the Consent Order are not solely remedial but are punitive in nature. Accordingly, proceeding with the indictments would subject defendants to double jeopardy, and the motion to dismiss the indictments is GRANTED.

IT IS SO ORDERED.

---

[1] Hudson was ultimately fined $16,500.00, while Baresel was fined $15,000.00 and Rackley was fined $12,500.00.

APPENDIX C

[Filed Nov. 5, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CR 92-152-T

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN HUDSON, LARRY BARESEL, and
JACK BUTLER RACKLEY,
Defendants.

Defendants have filed a motion for stay or continuance of trial date pending timely filing by defendants of a petition for a writ of certiorari in the Supreme Court of the United States seeking review of the decision of the Court of Appeals for the Tenth Circuit reported as *United States v. Hudson*, 92 F.3d 1026 (10th Cir. 1996). The cited decision is the second reported appellate decision in this cause. The first opinion of the Court of Appeals is reported as *United States v. Hudson*, 14 F.3d 536 (10th Cir. 1994).

Trial in the above-styled cause is currently scheduled to begin on November 12, 1996.

Defendants seek to continue or stay the trial date pending consideration by the Supreme Court of a petition for a writ of certiorari to review the decision of the Tenth Circuit which, defendants state, will be timely filed pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 13.1. The question presented for Supreme Court review,

defendants state, will be whether the current indictment against defendants is barred by the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States. Defendants have advised the Court that counsel for the government has been contacted with regard to the requested continuance or stay and has authorized for defendant John Hudson to state that the government has no objection to the requested relief.

Upon consideration of defendants' motion and supporting memorandum, it is hereby ordered that the motion is GRANTED.

The trial of this cause is removed from the November 1996 trial calendar pending timely filing by defendants of a petition for a writ of certiorari in the Supreme Court.

If the petition for a writ of certiorari is granted, this stay will remain in effect pending final disposition of the cause by the Supreme Court.

If the petition for a writ of certiorari is denied, this stay will terminate of its own force.

Pursuant to 18 U.S.C. § 3161(h)(1)(E), the Court finds that the period of the requested stay or continuance of trial is excluded from computation of the time within which trial for an offense must commence because the delay is delay "resulting from [an] interlocutory appeal". Interlocutory appeals on questions involving application of the Double Jeopardy Clause are authorized pursuant to the decision of the Supreme Court in *Abney v. United States*, 431 U.S. 651 (1977).

Alternatively, pursuant to 18 U.S.C. § 3161(8)(A) and (B), the Court finds that the period of delay resulting from the granting of this continuance serves the ends of justice and outweighs the best interests of the public and the defendant in a speedy trial. In support of the foregoing alternative finding, the Court observes that the significant Double Jeopardy questions which appear to be presented by this case have now been twice considered by

this Court and twice considered by the Court of Appeals. It is in the best interests of all parties, and of the public, that defendants be given an opportunity to present their petition for Supreme Court review of the Double Jeopardy issues prior to trial, if any, in accordance with the mandate of the Supreme Court in *Abney, supra.*

IT IS SO ORDERED this 5th day of November, 1996.

/s/ Ralph G. Thompson
RALPH G. THOMPSON
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 95-6030

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
JOHN HUDSON; LARRY BARESEL; JACK B. RACKLEY,
Defendants-Appellees.

ORDER

Entered September 20, 1996

Before TACHA, LOGAN, and REAVLEY,* Circuit Judges.

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER
Clerk

/s/ Opal A. Carter
By OPAL A. CARTER
Deputy Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CR-92-0152-T

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN HUDSON, LARRY BARESEL, and
JACK BUTLER RACKLEY,
Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
HAD ON APRIL 7, 1994
EVIDENTIARY HEARING ON
MONEY SANCTIONS ISSUE

Before the

HONORABLE RALPH G. THOMPSON

Judge Presiding

* * * *

[3] THE COURT: Good morning, ladies and gentlemen.

This is the United States of America versus John Hudson, Larry Baresel, and Jack Butler Rackley.

This is a hearing being held pursuant to the order of the United States Court of Appeals for the Tenth Circuit in this case which affirmed in part, reversed in part, vacated in part and remanded the case for further proceedings consistent with their opinion so that an evidentiary hearing could take place and factual determinations be made with regard to the issues subject of the remand.

And if counsel, beginning with the government, would make your appearance, we'll begin.

MR. OGILVIE: Good morning, Your Honor. Tim Ogilvie and Barbara Poarch on behalf of the United States.

Also present is special agent James Strickland of Federal Bureau of Investigation?

MR. NEVILLE: Drew Neville, B.J. Rothbaum, Your Honor, and Russell Cook for Mr. Hudson.

MR. ROLFE: Jim Rolfe for Larry Baresel.

MR. PRINGLE: And Lynn Pringle for Larry Baresel.

M. GILE: Merle Gile for Jack Rackley.

THE COURT: Are the defendants present for this hearing?

[4] MR. ROLFE: They are, Your Honor.

MR. NEVILLE: They are, Your Honor.

THE COURT: Thank you.

Would the government proceed, please.

MR. OGILVIE: Thank you, Your Honor.

If the Court would permit me, I'd like, maybe by way of introduction, to advise Your Honor that, prior to this hearing, counsel for all parties had a meeting concerning this hearing and the exhibits that we propose to introduce. Each side has disclosed to the other the exhibits that they intended to offer, and I think I can speak for counsel for all defendants as well as the government in saying that the documentary evidence that we want to introduce for the Court's consideration has all been stipulated to, and the Court—or the government would like to call one witness in addition to the exhibits that it would like to offer during this hearing.

THE COURT: Do you have the stipulation prepared to be recited for the record, or may it simply, on the basis of what you've said, be so stipulated?

MR. NEVILLE: Your Honor, we would be happy to so stipulate. We have reviewed—we have seen and reviewed the government's exhibits. We have no objection to their admissibility. I state that for the record and, I

think on behalf of all defendants; and as I understand, my agreement with Mr. Ogilive, he has received and reviewed all of our exhibits, and [5] he has no objection to the admissibility of our—of our exhibits, in order to expedite and shorten this hearing.

THE COURT: Thank you very much.

For the record, do the other defense counsel, on behalf of your respective clients, agree with what Mr. Neville has just announced?

MR. ROLFE: Yes, Your Honor.

MR. PRINGLE: Yes.

MR. GILE: Yes.

THE COURT: Excuse me, Mr. Gile.

Mr. Ogilive, do you make the same stipulation with regard to that.

MR. OGILVIE: I do, Your Honor.

THE COURT: Thank you all for that effort. That will streamline matters considerably.

MR. OGILVIE: The government would like to call one witness this morning, Your Honor. That's Daniel Stipano.

Daniel Stipano, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. OGILVIE:

Q. Sir, good morning. Would you please state your name.

A. I'm Daniel Stipano.

Q. And how are you employed, Mr. Stipano?

[6] A. I'm the Assistant Directory of the Enforcement and Compliance Division for the Office of Comptroller of the Currency.

Q. How long have you been with the O.C.C.?

A. Approximately nine years.

Q. And are you an attorney?

A. I am an attorney.

Q. How long have you been practicing law?

A. Approximately eleven years.

Q. The division within the O.C.C. that you are a part of, again, is what?

A. The enforcement/compliance division.

Q. And what are the duties of the enforcement and compliance division?

A. Our primary duties are to ensure that banks are operated in a safe and sound manner, and compliance with law.

Q. And the O.C.C. is the agency, isn't it, that supervises national banks?

A. We are the primary regulator of national banks.

Q. What position do you hold within the enforcement and compliance divisions?

A. As I mentioned, I am the assistant director.

Q. And how long have you been assistant director?

A. For almost five years.

Q. And does your position as assistant director give you an [7] understanding and some input of what the O.C.C.'s policies are concerning the enforcement of banking regulations?

A. Very much so. In the enforcement area, part of my job is to help draft policies on enforcement-related matters.

Q. And does your position as assistant director also give you familiarity with the regulations and the laws that banks must adhere to?

A. Yes.

Q. Are you familiar with the O.C.C. civil money penalties assessed against Mr. Hudson, Baresel, and Mr. Rackley?

A. Yes, I am.

Q. How is it that the—the acts that led to these civil money penalties came to your attention?

A. In 1988, I was the staff attorney for the O.C.C who was assigned to review and investigate these matters.

Q. And who was that?

A. No, I was the staff attorney.

Q. I'm sorry. And who referred that information to you?

A. The initial referral was made by Larry Burch. He is a national bank examiner who works in our Oklahoma City office. Mr. Burch made a referral from his 1987 examinations of the First National Bank of Tipton and the First National Bank of Hammon, Oklahoma.

That referral was reviewed in our Dallas district office and subsequently referred to Washington. I was the staff [8] attorney who received the referral, reviewed it, and made recommendations on it.

Q. What recommendation did you make?

A. My initial recommendation was to commence a formal investigation.

Q. And were you the attorney who was in charge of the formal investigation?

A. I was in charge. Yes.

Q. Does a person have to hold a certain office, either in a bank or a bank holding company, before they are subject to O.C.C. jurisdiction, as it were?

A. Yes. The statute has changed since 1988, but at the time, the individual had to be an officer or director or a person participating in the affairs of the institution.

Q. And did Messrs. Hudson, Baresel, and Rackley all fit within that description?

A. Yes, there did.

Q. What happened as this normal investigation commenced?

A. The investigation was commenced to discover additional facts concerning the transactions that had been referred to us, and in order to develop the factual record, we took a series of depositions, primarily in Oklahoma City, of the people—the people who were the principals of the transaction as well as a number of the borrowers. The investigation lasted approximately 100 days.

[9] At the conclusion of the investigation, I presented my findings to the O.C.C.'s supervision review committee, which is a charging body within the agency composed

of senior agency officials who are responsible for such matters. My findings were that Mr. Hudson, Mr. Rackley, and Mr. Baresel had all participated in violations of the bank's lending limit, both at Tipton and Hammon, and in violations of Regulation O, which is the Federal Reserve regulation which governs the amount of money that can be lent to insiders.

Based on those violations, I recommended that civil money—civil money penalties be assessed against all three individuals and that they be removed from the banking industry, as well.

Q. Why was it that the O.C.C. was concerned with violations of a bank's lending limit?

A. The lending limit is a—is a very old statute that governs the amount of money that a bank can loan to any one particular borrower. The purpose of the lending limit, generally speaking, is to prevent a bank from loaning too much money to any one particular borrower so that they'd be putting all their eggs in one basket. Another purpose of it is to make sure that the bank is meeting the credit needs of the community by spreading credit around among a lot of people, not just one borrower.

Q. What was the O.C.C.'s concern concerning the [10] insider transactions?

A. There are very stringent limits on the amount of money and the types of loans that can be made to insiders.

The problem with Tipton and Hammon was that the loans in question, which we felt were all attributable to Mr. Hudson, because he benefited from them, exceeded five percent of the bank's capital. The law provides that once borrowings to any particular insider exceed five percent, they can only be made with prior board approval with the individual in question abstaining from the vote. In this case, there was no prior board approval obtained for the advances.

Q. As you began the investigation into these particular transactions, were you made aware of whether or not there had been any previous violations involving either

Tipton or Hammon during the time Mr. Hudson was the principal shareholder?

A. Yes, I was.

Q. What—tell us about the history of the violations that led up to the findings that you made.

A. The bank had been—or the bank had been cited for insider violations at the previous exam, both at Tipton and at Hammon. These were exams that were conducted in 1986.

In addition, both institutions were operating under a formal agreement. This is an enforceable document that are put on banks that are in a troubled condition. It is designed to force the banks to correct their policies and procedures and [11] take corrective actions so that they operate in a safe and sound manner in compliance with the law.

Q. How seriously does the O.C.C. construe the existence of a formal agreement?

A. It's very serious. In terms of the—if you could look at it in terms of the hierarchy or enforcement actions, the O.C.C. will take actions ranging from informal actions, which could be just morally suasion, asking the bank to pass a board resolution, or enter into a non-enforceable document, like a memorandum of understanding or a commitment letter. The most serious sanction in that hierarchy would be a cease and desist order. The second most serious action would be a formal written agreement.

Q. Did the O.C.C. make attempts at some of these lesser remedies, such as the memorandums of understanding or the commitment letters?

A. No, I believe that the—I believe that the first enforcement action that was taken against the institutions was a formal agreement in both cases. The reason for that being that, by the time the banks had been examined in 1986, their conditions had deteriorated to the point where we felt that we would best be able to address the problems through a more formal document.

Q. And who all were the parties to the formal agreements?

A. The board of directors of both banks and a representative [12] of the comptroller.

Q. Did the bann, in that formal agreement, agree to correct the lending limit and insider transaction violations?

A. I—I don't recall, I'd have to see the document.

Q. What else transpired during your investigation then into—into these transactions?

A. We—as I say, once the investigation was concluded, I presented my findings to the enforcement—supervision review committee, may have been called "enforcement review committee" at that time, and they agreed with my recommendations.

So notices of intent to remove and subsequent notices, penalty assessments notices were drafted and served on the respondents, and an administrative proceeding was commenced against all three of them.

Q. Is the decision then to assess civil money penalties and the decision to seek removal then is not made by any one particular person; is that correct?

A. Oh, no, no, no. It's made by the supervision review committee who—who acts as a advisory body for the senior deputy controller of the banks division.

Q. How many people sit on that committee?

A. I believe there are six.

Q. Prior to the—the issuances of these notice to assess civil money penalties and intent to remove these three defendants from banking, did the O.C.C. cause what is known as [13] 15-day letters to be sent to each of these gentlemen?

A. Yes, they did.

Q. And could you explain to Judge Thompson would a 15-day letter is.

A. By statute, before we assess a civil money penalty, the agency is supposed to consider certain statutory factors. They cover things like the gravity of the violation, the history of previous violations, the financial resources

of the individual, and other factors that justice may require.

In order to solicit that feedback so that we—we have information on all those factors when we make a charging decision, we send what's called a 15-day letter, and those are the letters that each of these three individuals received.

Q. Would you please open up the black notebook that's on the table in front of you and look at Exhibits 1 through 4, and please tell us whether or not these are 15-day letters that were sent to Mr. Hudson.

A. Yes, they are.

Q. And it appears that there are two concerning Tipton and two concerning Hammon, each with respect to a different date of a report of supervisory activity; is that correct?

A. Yeah. The first one concerns the report of supervisory activity from September 30th of 1986, the second one is from the report of May 31st, 1987, and the third from September 30th, 1986, and the final one was from May 31st of 1987.

[14] Q. Would you please turn to Exhibit Number 5. This is the response that Mr. Hudson provided to the O.C.C.?

A. Yes.

Q. And this is in response to the 15-day letter; correct?

A. Yes, it is.

Q. And at the very end of this exhibit there is a fairly detailed financial statement from Mr. Hudson. Do you see that?

A. I do.

Q. Was financial information requested of Mr. Hudson in the 15-day letter?

A. Yes, it was.

Q. Why was the O.C.C. concerned with what Mr. Hudson's financial condition was?

A. Well, as I—as I mentioned, the statute requires us to consider the financial capabilities of the individual when

we assess a civil money penalty. So we asked or that information from all three respondents. We received it from Mr. Hudson, and it was taken into account in fixing the size of the civil money penalty.

Q. And at some point then thereafter, notices of assessment of civil money penalties and notice of removal were served on all three defendants; correct?

A. Yes.

Q. And would you turn to Exhibit Number 6. Is this that [15] notice that's addressed to Mr. Hudson, Mr. Rackley, and Mr. Baresel?

A. Yes, it is.

Q. Would you please pay—turn, excuse me, to page 12 of this notice, in the second full paragraph, where it says "take notice." Do you see that paragraph?

A. I do.

Q. It mentions that the respondents, that being the three defendants here,—correct?

A. Yes.

Q. —could have a hearing, if they wanted to, before the comptroller?

A. Yes.

Q. Did they elect to have a hearing or not?

A. I—I don't specifically recall them filing a request for hearing, but I will assume that they did because we went ahead and—and proceeded down the road in the administrative process before an administrative law judge. So I'll assume that they did request hearings.

Q. Please turn to Exihibit Number 7. Is this the stipulation and consent order that effectively terminated the O.C.C.'s proceeding against Mr. Hudson?

A. It is.

Q. And by signing this, did Mr. Hudson agree that he had committed the violations that the O.C.C. said that he had [16] committed?

A. No, he did not.

Q. Does this also waive any further rights to have—whether or not he had committed these acts—litigated before an administrative law judge?

A. Yeah. He—he waived any ability to challenge the validity of the order.

Q. Did the O.C.C.'s inquiry then into Mr. Hudson with respect to these transactions cease when this stipulation and consent order was signed?

A. Yes.

Q. Would you please turn to Exhibits Number 8 and 9. Are these the 15-day letters that were served on Mr. Baresel?

A. Yeah. The first one, again, is from September 30th, 1986 examination, and the second is from the—UHM—the second one also appears to be from the same examinations.

Q. But they were two different banks; correct?

A. Yes. The first one was First National Bank of Tipton, and the second was First National Bank of Hammon.

This—this indicates that there was an earlier civil money penalty referral from the 1986 exam as well as one from the 1987 exam. That's why there are two letters.

Q. And Mr. Baresel provided two responses as indicated by Exhibits Number 10 and 11; correct?

A. Yes.

[17] Q. And did he also provide financial information in his responses?

A. Yes, he did

Q. And was that requested by the O.C.C. for the same reason it was requested of Mr. Hudson?

A. It was.

Q. Would you please turn to exhibit number 12. Is this the stipulation and consent order that terminated the O.C.C.'s proceedings against Mr. Baresel?

A. Yes.

Q. In signing this, did Mr. Baresel admit that he had done the acts that the O.C.C. said that he had?

A. No, he did.

Q. Did he also waive, by signing this document, his right to have those facts litigated before an administrative law judge?

A. Yes, he did.

Q. So did the execution of this document also terminate O.C.C. proceedings with respect to Mr. Baresel?

A. It did.

Q. Would you please turn now to government exhibits number 13 and 14. Are these the two 15-day letters that were sent to Mr. Rackley?

A. Yes, they are.

Q. And did Mr. Rackley also submit two responses, one for each bank, as indicated in government exhibits 15 and 16?

[18] A. He did.

Q. Did he also—I'm sorry, I think I've—I asked you this already—provide financial information to the O.C.C. with this response?

A. Yes.

Q. And was that requested of Mr. Rackley for the same reason it was requuested of Messrs. Hudson and Baresel?

A. It was.

Q. Would you look at government's exhibit number 17. Is this the stipulation and consent order that terminated the O.C.C.'s proceedings against Mr. Rackley?

A. Yes.

Q. And in signing this, did Mr. Rackley admit whether he had done the acts that the O.C.C. said that he had?

A. No, there was no admission.

Q. And did he also waive his right to have that fact litigated before an administrative law judge?

A. Yes, he did.

Q. If you had noticed by looking at the stipulation and consent orders, each of these three defendants consented to a civil money penalty far less than what had originally been assessed against them.

A. Yes, they did.

Q. And do you know the reason for that?

A. Yeah. The primary reason was they had no money. Judging [19] from the representation that each of them had made about their financial condition, they did not appear to have the financial means to pay the penalties as assessed in the notice.

There's another reason, as well, which is that the agency will frequently settle cases, as we did here, because it gets the matter behind us. If we had to choose to hold out and litigate it, it could have been, you know, a year or two down the road before we would finally get a resolution of the matter.

This settlement provided us with certainty. We knew we were going to get civil money penalties in the amounts indicated, and we also knew that we were going to have these three individuals removed from the banking industry.

Q. And they consented to that, as well, correct,—

A. Yes, they did.

Q. —the removal?

A. Yes.

Q. Is the final figure of the civil money penalties then more reflective of the seiousness of the harm that they had caused or more reflective of their financial condition at the time?

A. It's really a mixture of the two. In this case, I mean, their financial conditions were so poor that we—we really couldn't assess a penalty that we thought was proportionate to the harm. We assessed a penalty that we felt was appropriate given the harm as well as their financial conditions.

Q. If you would, please look at the other set of exhibits, [20] the defendants' exhibits that are on the table next to you, at exihibit number 5, the affidavit of Susie Pritchett.

A. Okay.

Q. Would you please turn to page 4 at paragraph E.

A. Okay.

Q. Do you have that—that sentence? Ms. Pritchett says in her affidavit, "I do not recall there being any discussion or government demand that Baresel or the others make restitution for any losses"; correct?

A. Yes, I see that.

Q. Is that a true statement?

A. I—I don't recall if there was any discussion, but if there wasn't any discussion, the reason was we did not have the legal authority to use our enforcement powers to compel officers and directors to make restitution at the time.

Q. Has that been changed today by statute?

A. Yeah. There was a—a legislative fix that was put in place in 1989 as part of the F.I.R.R.E.A., the Financial Institutions Reform, Recovery and Enforcement Act, that allowed the O.C.C. and the other banking agencies to use their cease and desist powers to compel restitution. However, at the time, the governing precedent was a case called Laramore versus the Comptroller of the Currency, which held that we did not have the authority to use our cease and desist powers that way. We followed that decision and, therefore, we did not feel that we [21] had the legal authority to order restitution at the time.

Q. Would assessment then of a civil money penalty be the only way that the—the O.C.C., by itself, could have obtained any kind of enforceable money judgment, penalty, whatever, against these three defendants?

A. Yes.

Q. Would you please turn to government exhibit number 19.

A. Okay.

Q. Okay. Could you explain what this letter is?

A. Yeah. This is a letter that I wrote to you which addresses a number of things.

The—the first part of it, under number 1, is an estimated cost of the investigation and administrative actions that the O.C.C. incurred.

Q. And you have there costs associated with your work, that of Rosmary Cole, attorney, and Adam Bioloski, and Larry Burch, the examiner; correct?

A. Yes.

Q. In addition to these persons, were there others who also worked on the investigations into Messrs. Hudson, Baresel and Rackley?

A. Yes. Larry—Larry Burch was the examiner in charge of the examination. He had a crew with him when he did the exam. I wouldn't know how many people were on the crew, but it's fair to say that he—he didn't do it by himself.

[22] There's also, obviously, clerical support at all levels, at the duty-station level, the district office, the Washington office, there were funds paid to the administrative law judge who heard the case, there were other—other expenses, as well.

Q. And would other people, such as Elizabeth Cory, to whom the 15-day letter responses are directed, who also worked on this investigation?

A. Yeah, Elizabeth was the—Elizabeth Cory was the initial reviewing attorney in the Dallas district office, and she—she did work on it at that level.

Q. Would you please turn to exhibit number 20, government's exhibit, and explain what this document is.

A. This is the Federal Financial Institution's examination council. It's their policy on the assessment of civil money penalties.

Q. And this one was in effect as of what day?

A. This became effective on July 23rd, 1980.

Q. And would you turn to exhibit number 21 and explain what this is.

A. This is an excerpt from the O.C.C.'s policies and procedural—procedures manual. It is—is the O.C.C. civil money penalty policy that was in effect at—as of January 28th, 1988.

Q. And is this the one that was in effect at the time the [23] stipulation and consent orders were entered into by these three defendants?

A. Yes.

Q. Do you see the paragraph on Exhibit Number 21 headed "Purpose" on the first page?

A. Yes.

Q. Would you read the sentence that's there in the second paragraph that begins "these policies"?

A. It states: "These policies are internal guidelines for the use of the O.C.C. and do not create any substantive or procedural rights enforceable at law or in any administrative hearing."

Q. Are the powers that the O.C.C. has granted to it by Congress?

A. Yes.

Q. And Exhibit Number 22: Could you explain what this is.

A. This is a later version of the same policy.

Q. That's dated—when did this one go into effect?

A. April 8th, 1991.

Q. And Exhibit Number 23: What is that?

A. Yet another version of it. This is the most recent one. It was issued on June 16th, 1993.

Q. During this period of time, had Congress changed the law with respect to what powers the O.C.C. had? Is that why there are changes in this policy statement?

[24] A. Yeah. The—the reason we changed the 1988 one and issued the 1991 policy was because of the enactment of F.I.R.R.E.A., which I mentioned earlier.

Prior to F.I.R.R.E.A., the O.C.C.'s authority was that we could assess civil money penalties of a thousand dollars a day. After F.I.R.R.E.A., there was a three-tiered structure that was put in place that was a substantive change in the law, and we felt that in order to have our policy conform to the new law, we needed to revise the policies. That's why we did it.

The penalties against Mr. Hudson, Mr. Rackley and Mr. Baresel were under the pre-F.I.R.R.E.A. law.

Q. So the appropriate policy again would have been Exhibit Number 21, January 28th, 1988?

A. Yes.

Q. What is it that the O.C.C. was trying to accomplish in assessing civil money penalties and the removal actions against Messrs. Hudson, Baresel and Rackley?

A. The purpose of civil money penalties is to deter future violations of law or encourage the correction of existing violations, and that's what we were hoping to accomplish.

The purpose of the removal action is to prevent the person from working in the banking industry again so that they cannot engage in additional violations or inside practices.

Q. Do you know what the amount of losses due to loans that are mentioned in the 15-day letters were at Hammon and Tipton?

[25] A. Yeah. In both cases, they were slightly under half a million dollars. The aggregate loss at the two institutions was between 900,000 and $1 million.

Q. Do you know who actually bore the costs of those losses?

A. The Federal Deposit Insurance Fund.

Q. And what kind of agency is that?

A. It's a government agency.

Q. During the time that you had negotiations with Susie Pritchett on Mr. Baresel's behalf, did you know that there was a pending criminal investigation concerning these same transactions?

A. I did.

Q. Did Ms. Pritchett know?

A. Yes.

Q. Did Mr. Baresel know?

A. Yes.

Q. Do you know whether or not Mr. Hudson knew?

A. I think he was aware of it. We had discussions with him, and I recall that at the prehearing conference that was held in the administrative case, that was a matter of concern to Mr. Hudson.

Q. And do you know whether or not Mr. Rackley knew?

A. Mr. Rackley knew, as well.

I would also add that I deposed all three individuals as part of my investigation. My recollection is that Mr. Hudson [26] and Mr. Baresel took the Fifth Amendment to every question, and Mr. Rackley took the Fifth Amendment to a number of questions.

Q. What group is it—what class of people is it that the O.C.C. exists to protect?

A. The depositions of the financial institutions.

Q. And were the actions taken by the O.C.C. in this case against Hudson, Baresel and Rackley designed to achieve that end, to protect the depositors at Hammon and Tipton?

A. In my judgment, yes.

MR. OGILVIE: May I have just one moment, please, Your Honor?

THE COURT: Yes.

MR. OGILVIE: That's all I have of Mr. Stipano, Your Honor.

CROSS-EXAMINATION

BY MR. NEVILLE:

Q. Mr. Stipano, with respect to Government's Exhibit Number 22, which was, I believe, a policy statement by the Comptroller's Office,—

A. Yes.

Q. —that went—that statement went into effect in 1991; is that correct?

A. It did.

Q. And that, of course, was after the stipulation and consent order that had been entered into by all of the defendants in [27] this case; correct?

A. That is correct.

Q. Now, plaintiff's exhibit number 19, which, I believe, is your letter to Mr. Ogilvie in April of this year,—

A. Yes.

Q. —what was the purpose of you sending the letter to Mr. Ogilvie?

A. He asked me for a breakdown of how much the agency spent on the investigation and prosecution.

Q. And that was for purposes of establishing what you claim to be the government loss for purposes of this hearing?

A. I don't know why he wanted it. He asked me to provide it.

Q. When did you first start to assemble the information that's set forth in the Government Exhibit 19?

A. I don't have a precise date. My—well, for—the specific information in the letter I started putting together probably, say, a week to a week-and-a-half before the date of the letter.

Q. That would be late March or early April—

A. Yes.

Q. —of this year?

A. Yes.

Q. All right. And there's a line item called "estimated costs of investigation and administrative action to the O.C.C."

A. Yes, sir.

[28] Q. And what do you mean "estimated costs"?

A. Well, in some areas I was able to provide a figure that I think has a degree of reliability. For example, on travel expenses, the—all of us—all of the people that work for the agency are required to submit travel vouchers, and I was able to retrieve the travel vouchers and just add up the costs.

In other areas, I think it's less precise, you know, at this late date, to go back and to try to figure out what—what the cost was.

So, for example, for salary, I would take my salary at the time and divide it by what I thought was the percentage of time that I had spent on the case during the relevant time period to arrive at a figure.

Q. And—And I'm not trying to be nosey, but what was the percentage that you used?

A. My estimate—my average salarly during the period was $49,800, and I estimated I'd spent a third of my time on this.

Q. Okay. So you spent two-thirds of your time on other matters?

A. Yeath.

Q. So this—the Hudson-related matter was not the only investigation that you had going?

A. It was the only investigation I had going. Yes.

Q. Okay, but you were tending to other matters in the Comptroller's Office, I take it,—

[29] A. Yes.

Q. —related to enforcement and compliance?

A. Yes.

Q. And I think it if the Hudson matter had not been on the table, so to speak, you would have still been working for the Comptroller's Office.

A. I hope so.

Q. And that would have been the same with Mrs. Burch or—or Mr. Burch and Mr. Hill?

A. As far as I know, yeah.

Q. And they would have had other matters they would have been tending to, as well; correct?

A. Sure.

Q. Now, also you factored into the cost something called "benefits"; is that right?

A. Yes.

Q. And is the government in this proceeding claiming, as part of their investigatory loss, some bene- —some kind of benefits?

A. No, it's—it's just a percentage of our total compensation. It's just a—I multiplied our salary—the percentage of our salaries by 36 percent.

Q. Okay. What kind of benefits? Are we talking health care and—

A. Yeah, exactly.

[30] Q. —that kind of thing?

A. Yes.

Q. So that that's part of the so-called investigative loss that the government's—

A. Well, it's part of our—our compensation as government employees.

Q. Is that part of the investigative cost that you're asking the court to consider in determining whether the civil monetary penalties were solely remedial as opposed to punishment?

A. I—not directly. No.

Q. Now, the notice of assessment that you made an earlier reference to, that was issued in February of 1989; is that correct?

A. Is there a copy of it in the exhibits?

Q. You might look on—in the defendants' list as Bates Number 00153, and that will either be exhibit 2 or 3, but there'll be—you'll see a Bates number in the lower right-hand side. Be in Exhibit 3.

A. Yeath, I—I found it.

Your question goes to the notice of assessment?

Q. Yes, the date that it was issued. The date I have is February of 1989.

A. February 13th, 1989.

Q. Yes. And when did the Office of the Comptroller first consider assessing the sum, the amount of $100,000 against [31] Hudson and $50,000 against Baresel and Rackley, and I'm talking about the amount?

A. The amount would first have been considered when I presented the findings of my investigation to the

supervision review committee. I don't have a precise date. It would probably have been January of '89.

Q. Well, isn't it true that Mrs. Elizabeth Cory established the sum of $100,000 to be assessed against Mr. Hudson, Rackley—or Mr. Hudson, $50,000 against Baresel and Rackley, in March of 1988?

A. No. Ms. Cory had no authority to establish any penalty.

Q. Okay. Didn't she make a recommendation in that regard?

A. I don't know if she did or not. If it's—

Q. Okay. Let me invite your attention to defendants' exhibit number 2 and the Bates Stamp 00032.

A. Okay. She made a recommendation to that effect.

Q. Yes, sir. And you identified this Bates Number 00032 in Exhibit 2 as being Mrs. Cory's memorandum to Mr. Bodner dated 3-23-88, just to make sure we're all reading from the same page?

A. That's correct.

Q. And Mrs. Cory, after reviewing all of the facts set forth in—in an '86 examination and in an '87 examination, Mrs. Cory, in March of '88, made a recommendation of a $100,000 assessment against Mr. Baresel; is that correct?

[32] A. Yes, she did.

Q. Or Mr. Hudson, is that correct?

A. A hundred thousand against Mr. Hudson.

Q. And 50,000 against Rackley and Baresel; correct?

A. No, she recommended 75,000.

Q. Okay. She made a recommendation of an amount?

A. Yes, she did.

Q. Okay. Against the other defendants; correct?

A. That's correct.

Q. And that was prior to the time that the Government incurred all of these—this $72,500 in investigatory expenses; correct?

A. Yeah. Yes, that's correct. Although, I—let me—I'm sorry, let me clarify that. Probably a portion of the

examiner, Larry Burch's, expenses had already been incurred, because he had done the examination.

Q. Okay. But my point is that the amount—there had been a recommendation of a hundred thousand dollars against Mr. Hudson. After Mrs. Cory reviewed all of the '86 and '87 examinations of the bank, she made that recommendation in March of '88?

A. She did.

Q. And, in fact, that's what ultimately was assessed against Mr. Hudson, at least initially.

A. Yes.

[33] Q. And that was prior to the time that the—these deposition expenses were—were incurred by the Government; correct?

A. Mrs.Cory's recommendation was prior to the investigation.

Q. Yeah.

Now, you indicated also that you had financial information from Mr. Hudson?

A. Yeah, as—as provided in—in his 15-day letter response.

Q. And you received financial information from Mr. Hudson prior to the notice of assesment; did you not?

A. I did.

Q. In fact, you had financial information from Mr. Hudson in February of 1988; correct?

If you want to take a look at plaintiff's exhibit number 5, or Government's exhibit number 5, which should be a letter.

A. Yes.

Q. Okay. That a letter—just for the record, that's a letter from Mr. Hudson's counsel to Mrs. Cory; correct?

A. Yes.

Q. And it sets forth Mr. Hudson's positions with respect to the comptroller's allegations?

A. It does.

Q. Those allegations having been made in the 15-day letters [34] that we—that you earlier talked about; correct?

A. Yes.

Q. But this letter, February the 8th of '88, of course, predates the depositions and—that took place; correct?

A. It does.

Q. And in February of '88, prior to the time the assessments were actually made, this letter provided the Government or the O.C.C. with information concerning Mr. Hudson's financial condition; correct?

A. Yes.

Q. And in fact, Mr. Hudson's counsel—you were advised through his counsel that Mr. Hudson had a negative net worth of some $5 million; correct? Page 14, if that will aid you.

Mr. Stipano, I'm not—I don't want to deter you from looking at anything you want to look in the exhibit, but if I may invite your attention to exhibit 14 in the February 8th, 1988 letter.

A. Exhibit 14?

Q. Page 14.

A. Page 14.

Q. Yes.

A. In the letter itself as opposed to a supplement?

Q. Yes. And if you—

A. Okay.

Q. I'm not trying to prevent you from looking at the [35] supplement?

A. I know. I know. Yeah, it—it shows a net worth of negative—negative—slightly over a negative 5.7 million.

Q. And you had that information prior to the time that you assessed the hundred thousand dollar figure?

A. Yes.

Q. So, basically, at least initially, the comptroller assessed a hundred thousand dollar civil monetary penalty

against Mr. Hudson in the face of a negative net worth of what was represented to you to be $5 million; correct?

A. Yes.

Q. And Mr. Baresel and Mr. Rackley, you had financial information on them, as well; did you not?

A. We did.

Q. And that information, basically, showed a very weak financial condition; correct?

A. Yes.

Q. And you had that information prior to the time the Government initiated the investigation, the costs of which you have referenced in the letter.

A. We did.

Q. Now, the total, if I understand correctly, in your letter—your April letter to Mr. Ogilvie, the investigatory loss was $72,000? Isn't that what it totaled?

A. The—the cost to the Government, the O.C.C.—to the [36] O.C.C., I would say was approximately 72,000.

Q. Okay. And, of course, I suppose if you had wanted to, you could have made those same estimates in 1988; could you have not?

A. I don't understand the question.

Q. Well, you provided Mr. Ogilvie with a letter estimating—

A. Oh.

Q. —the cost breakdown to the O.C.C.—

A. Yes.

Q. —as a result of this investigation?

And that same information would have been available to you in early 1989; would it—would it have not?

A. It—it would have been available as of the time when we settled the case.

Q. Okay. Which was in—in what? The fall of '89?

A. Yeah. November.

Q. And wouldn't a substantial amount of that information have been available to you in early 1989?

A. Yeah, some of it would.

Q. Yeah. That's because all the depositions were taken in the fall of '88; correct?

A. That's correct.

Q. And would it not be fair to say that at least some or maybe even a substantial part of this $72,000 that you've set forth in your letter, you could have made that determination of [37] at least part of it prior to the time you sent out the notice of assessment?

A. Part of it, yes.

Q. Okay. And do you have any idea what the—the costs would have been at the time you sent out the notice of assessment?

A. I don't really—can't calculate that in my head.

Q. Okay. But, in summary, we have an assessment of a $100,000 in February of '89; correct?

A. Yes.

Q. You have investigatory losses to the Government, to the O.C.C., you claim to be some $72,000; right?

A. Yes.

Q. And you have Mr. Hudson with a negative net worth of some $5 million.

A. Yes.

Q. Then the amount was compromised later to the amount of $16,500; correct?

A. Yes.

Q. And the reason for that was because of the weak financial condition of Mr. Hudson?

A. Yeah, that was one reason, and also in order to—to bring the matter to closure for the O.C.C.'s purposes and to provide certainty in our relief.

Q. Now, let me invite your attention, if I may, to Government [38] Exhibit 18. Do you have Government's Exhibit 18 in front of you?

A. I do.

Q. This is Mr. Bioloski's memo of November of 1989 in regard to the compromise of the civil monetary penalties; correct?

A. Yes.

Q. And it's signed off on by several individuals at the bottom of the page; correct?

A. It is.

Q. Then there are some handwritten notations? Do you that? The lower right-hand corner.

A. Yes.

Q. And if I read it, and please correct me if I'm wrong, it says, "I agree with publication."

A. Yes.

Q. Okay. Meaning that the comptroller's office was intending to publicize the amount of civil monetary penalties assessed against all of the defendant's as well as their stipulation and consent order removing them from banking.

A. Yes.

Q. And that is consistent with an existing policy statement of the Government that existed at the time in regard to civil monetary penalties; correct?

A. Well, it was the law at the time. Any final order that was entered into after F.I.R.R.E.A. had to be made public as a [39] matter of law.

Q. Okay. Well, and there's a comptroller policy with regard to publication; is there not?

A. Well, in addition to the —the publicity that's mandated by statute, the policy at the time is that, on a case-by-case basis, the O.C.C. would also issue press releases on settlements.

Q. Yes. And on this case, the O.C.C. decided to issue a press release on these civil monetary penalties; didn't they?

A. Yes.

Q. And that—that decision is guided by a policy; is it not?

A. I think it's referenced in the civil money penalty policy.

Q. Yes. It's referenced in plaintiff's Exhibit Number 21; isn't it?

A. Yes.

Q. In fact, there's—Mr. Ogilvie had you read from the purpose section. There's a policy section on plaintiff's—or Government's Exhibit 21; is there not?

A. There is.

Q. And this was the—this was the comptroller's policy at the time the civil monetary penalties were assessed against the defendants; correct?

A. That's correct.

Q. And would you just read, please, the first sentence under [40] "policy."

A. "A civil money penalty can effectively deter or encourage correction of violations of laws, regulations, and cease and desist orders."

Q. And, in fact, the last sentence goes on to say that, "a C.M.P.—"

That's correct's a civil monetary penalty; isn't it?

A. It is.

Q. "—may also serve as a deterrent to similar violations."

A. Yes. It says, "A.C.M.P. may also serve as a deterrent to similar violations both by the persons against whom the penalties are assessed and by other banks and bankers."

Q. Okay. And then you made reference to, in certain cases, the comptroller's office would publicize the—the final order or the stipulation and consent order as well as the civil monetary penalties; correct?

A. I'm not sure I understand the question.

Q. Well, I may have muddled it. I'm sorry.

You indicated earlier that in certain cases—

A. Uh-huh.

Q. —the comptroller's office would publicize the stipulation and consent order which, of course, contained the amount of the civil monetary penalty.

A. Yes. But again, by law we are required to make the final [41] orders public,—

Q. Okay.

A. —and, in addition to that, we sometimes issue press releases on settlements.

Q. And isn't it true that, according to your policies, that that disclosure may serve as a deterrent to future violations—

A. Yes.

Q. —as well as be therapeutic to the system; correct?

A. Yes.

Q. In fact, there's—there's kind of a dual purpose associated with publicizing and telling the public about the amount of the civil monetary penalties and the actions that were taken by the comptrollers; right?

A. Yeah. In—in my judgment, the purpose is—is deterrents and also to show that when violations of law are committed and the O.C.C. detects them, we will take an appropriate supervisory enforcement action.

Q. And part of the reasons is deterrents?

A. Absolutely.

Q. Now, when was it that the comptroller, or someone in the comptroller's office, first considered assessing civil monetary penalties against Mr. Hudson?

A. That's a hard question to answer. The only body within the agency that had the authority to assess these penalties was [42] the Washington Supervision Review Committee, and the first time that a recommendation was made to assess civil money penalties was in January of 1989.

Q. Well, Mr.—didn't Mr. Burch recommend assessment of civil monetary penalties back in 1987?

A. Mr. Burch submitted a referral recommending that, yes,—

Q. Okay?

A. —but he—he didn't have the authority to do it.

Q. Okay, but Mr. Burch is a national bank examiner; correct?

A. Yes.

Q. Became in and examined the banks in question in this case; correct?

A. Yes.

Q. And he did that in the fall of 1987?

A. I—I don't have the precise dates, but—

Q. Okay.

A. —he examined them in 1987.

Q. Let me invite you to defendants' Exhibit Number 2, and you might take a look at Bates Number 00040.

A. What's the page number?

Q. 00040. It ought to be in the lower right-hand corner. Defendants' Exhibit 2.

A. Okay.

Q. And that's Mr. Burch's memo to Mr. Kraft of 9-21-87; correct?

[43] A. Yes, it is.

Q. And that—the subject of his memo is a civil monetary penalty referral; correct?

A. That is correct.

Q. And he recommended assessment of the civil monetary penalty in September of '87; did he not?

A. Yes.

Q. Okay. And he made that assessment after making at least some of a factual investigation into the case; correct?

A. He conducted an examination of the banks.

Q. Yeah. Which involved some review or investigation of what he perceived to be the defendants' conduct in this case; correct?

A. In a sense. I mean, it was a—my understanding is that it was a full-scope exam that looked at all aspects of the banks' operations, including compliance with law.

Q. Now, there was an Office of the Comptroller policy in effect in September of 1987 with respect to the assessment of civil monetary penalties; was there not?

A. Yes.

Q. And that's set forth in dependants' Exhibit Number 1; is it not?

A. Yes. Part of it.

Q. Part of it?

A. Yeah.

[44] Q. Okay.

A. Two out of 30 pages.

Q. Yes. And this policy statement was in effect at the time Mr. Burch made—was making his investigation and review; correct?

A. This—this was in effect at the time that Mr. Burch did the examination and submitted his referral.

Q. Yes. And isn't it true that the policy of the Comptroller at the time that Mr. Burch did his report in September of '87 and recommended civil monetary penalties was that civil monetary penalties should provide a deterrent to similar violations?

A. Yes.

Q. And on page 2 of the policy, again referring to defendants' Exhibit Number 1, it sets forth what should be considered in determining the amount of the civil monetary penalty; correct?

A. Yes.

Q. And what is supposed to be considered in the amount of the civil monetary penalty is good faith. I suppose that's the good faith of the defendants or what the Comptroller perceives to be the good faith of the defendants; correct?

A. Good or bad faith. Yes.

Q. Yes. The gravity of the violation?

A. Yes.

[45] Q. Would that include whether or not, in the comptroller's view, the defendants had violated the law?

A. If they hadn't violated the law, there wouldn't—there couldn't be a civil money penalty.

Q. Right. So it would necessarily include—

A. Yeah, the—

Q. —a perceived—or a conclusion that they'd violated the law?

A. Yeah. In this occasion, the bank's lending limit and Regulation O.

Q. Okay. So one of the factors in determining the amount of the civil monetary penalty is the defendant's conduct and whether or not it violated the law in the opinion of the comptroller?

A. Not—not really. I think that the inquiry initially is going to be whether or not they violated the law. I mean, that's—that's—if you don't have a violation of the law, you don't even consider a penalty. Then after—after you've decided there's a violation of law, then would you look at these factors which come out of the C.M.P. statute.

Q. Okay.

A. In determining gravity, we would look at things like the loss to the institutions, whether there was concealment—

Q. Willfulness?

A. Willfulness, certainly. Yeah. Good or bad faith.

[46] Q. Whether they'd acted in concert with others?

A. No.

Q. Okay. But at least willfulness and concealment would be factors; correct?

A. We would—we would consider a violation to be more serious if it was willful as opposed to being unintentional. Yes.

Q. All right. Now, with respect to concern—considering the gravity of the violation, there are some 13 factors that are at play according to the policy of the comptroller that existed in 1987.

A. There are—there are 13 factors that were set out in the F.F.I.A.C. policy statement of July 23rd, 1980, and we did take those into consideration.

Q. And those were some of which you've mentioned: willfulness, concealment.

But intent, was intent one of the factors that's considered?

A. I would have to see the policy, but I would think so.

Q. Okay. Now—now, in January of 1988, another policy was adopted—

A. Yes.

Q. —by the comptroller, part of which we've made reference to here; correct?

A. Yes.

Q. And there was placed into effect something called a [47] matrix, a civil monetary penalty matrix.

A. Yes, sir.

Q. And can you tell us what a civil monetary matrix is?

A. It was an attempt by the agency, in a non-scientific way, to provide some more concrete guidance to our examiners and people who were involved in the civil money penalty process as to the types of factors that are important in deciding whether to assess a penalty and the amount of weight that they should give to those factors.

Q. Well, in fact,trying to—trying to cut through some of this, the civil monetary penalty matrix was, in part, used as guidance to determine the amount of civil monetary penalty.

A. Oh, yeah. Yes.

Q. And there are some—a number of factors that go into the—the determination of amount as per the civil monetary penalty matrix; correct?

A. That is correct.

Q. And those factors are found on the fourth page of Government Exhibit 21; correct?

A. Yes. I'm looking at your—the Defense Exhibit Number 4, but I assume it's the same matrix.

Q. Okay, they are—they are the same, or at least I'll represent to you that they're the same.

A. Okay.

[48] Q. It's also attached, not in a filled-out fashion, to Government's Exhibit 21.

But anyway, this matrix, Defendants' Exhibit Number 4, or what's attached to Government's Exhibit 21, is used,

in part, at least to determine the amount of the civil monetary penalty.

A. It's a guide.

Q. Yes. It's a guide to determine the amount.

A. Yeah. I mean, it's—you know, when I say it's a guide, I guess what I'm getting at is we don't pretend that this is science and we're not wedded to it, but it's a guide.

Q. And I take it the reason you're saying that is because there's some exercise of judgment required before the civil monetary penalty is actually, in fact, assessed.

A. Yes.

Q. But the matrix is used as a guide in determining the amount?

A. Yes.

Q. And the factors that are used in the civil monetary penalty matrix are, and I won't bother to go through all of them, but willfulness, correct?

A. Yes.

Q. Insider?

A. Whether it's insider related. Yes.

Q. History?

[49] A. Yes.

Q. Loss?

A. Yes.

Q. Number of violations?

A. Yes.

Q. Duration of violations?

A. Yes.

Q. Concealment?

A. Yes.

Q. Impact?

A. Yes.

Q. Okay. And then I take it that what happens is that this is filled out in some form; is that not correct?

A. Yeah, at several stages. The examiner initially fills it out because it gives the examiner some guidance as to whether or not they have a violation that's serious

enough to consider further pursuing; it's also considered, you know, at the review level at the district office; and then finally by the attorney in Washington who is responsible for presenting the case to S.R.C.

Q. Let's take a moment to look at page 5 of Defendants' Exhibit Number 21.

A. Okay.

Q. Or Government Exhibit 21, which is the comptroller's policy on civil monetary penalties at January the 28th of 1988. Do [50] you have that in front of you?

A. Page 5 of the Government's Exhibit 21?

Q. Yes.

A. I show three pages, and then the matrix, and then the second page of the matrix.

Q. Do you have a last page that has a points—

A. Yeah.

Q. —reference to it?

A. Yes.

Q. Okay. And just for the record, that would be one, two, three, four,—well the fifth page.

A. Yes.

Q. Okay.

A. It doesn't say five on it, but that's correct.

Q. All right. The fifth page of the—of Government's Exhibit 21 has a—has columns, "Points," "Suggested Action," and "Responsibility"; correct?

A. It does.

Q. And the points are intended to reflect a score that's calculated on the mate—on the matrix; right?

A. Yes.

Q. And that translates into an amount of the fine—of the assessment or a guideline for the amount of the fine?

A. That's right.

Q. And was this matrix used in at least initially considering [51] how much money to assess against Mr. Hudson?

A. It was used by me, because I—I completed the one that's in the—in the books here.

Q. All right. Let's take a look at Defendant's Exhibit Number 4.

A. That—that's the matrix that I completed on Mr. Hudson.

Q. Okay. And you com—completed the—this civil monetary penalty matrix against Mr. Hudson pursuant to the policy that's set forth in Government's Exhibit 21; correct?

A. Yes.

Q. And you filled it all out and he like over a hundred points.

A. Yes, he did.

Q. And according to your policy, that would call for a fine of like a hundred thousand dollars.

A. Assessment of—consider assessment greater than a hundred thousand.

Q. Yeah. And that was determined on the basis, or at least you were given a guideline determination based upon the factors that are set out in the matrix.

A. That's correct.

Q. Now, and I guess it—it just so happened that that calculation worked out to be the same as Mrs. Cory's recommendation back in March of '88?

A. I—well, she recommnded a hundred thousand, and my [52] point total was off the scale, but I decided—my recommendation was a hundred thousand, as well.

Q. Right.

A. I thought her recommendation was appropriate.

Q. Now, you mentioned in your earlier testimony the supervisory review committee?

A. Yes, I did.

Q. What was the supervisory review committee?

A. It is a committee composed of senior agency officials who are responsible for making decisions of whether to pursue enforcement actions against banks and bankers.

Q. And you made a report to that committee; did you not?

A. I did.

Q. And that report is in exhibit 3, defendants' exhibit number 3, at Bates 114.

A. Yes.

Q. And on page 11 of that report, you set forth the factors you considered in assessing the civil monetary penalty; did you not?

If I misspoke, I apologize.

A. Yes.

Q. Page 11 of your memo that would be Bates Stamped 00124.

A. Yeath. I don't agree with that. Page 11 dosen't really address that. Page 13 does, where I talk about —the paragraph that starts, "the violations are extremely serious."

[53] Q. Well, your—your page 11 has a column, "civil money penalties"; does it not?

A. Yeah, but all I do there is recite the statute.

Q. Well, in the last sentence don't you say, "in determining the amount of the statutory penalty"?

A. I say what the statute requires.

Q. "—the O.C.C. is statutorily required to consider"?

A. Yeah.

Q. And is, in fact—aren't those the factors you considered in assessing the civil monetary penalty?

A. Oh, they were considered. Yes.

Q. Yeah. And then you go on to say, "in addition to the matrix."

A. Yes.

Q. Okay. And then you had a conclusion—you ended your memo with a conclusion; did you not?

A. I did.

Q. That expressed your objective, in part?

A. Yes.

Q. And you report to the supervisory review committee, and tell me if I don't read it correctly, that:

> "The Office of the Comptroller can accomplish a great deal by preventing these individuals from ever reentering the banking industry and, through publicity of these actions, hopefully deter other individuals from [54] similar conduct."

A. That's correct.

Q. And then you go on to say, "accordingly, a one-hundred-thousand-dollar fine is recommended," and then fines against the other two defendants; correct?

A. Yeah. That's accurate.

Q. Now, the F.D.I.C. in this case, the losses that you mentioned in regard to the banks, you understand Mr. Hudson did not agree that he caused losses to the banks?

A. Oh, I don't think he agreed. No.

Q. Yeah. And, in fact, the losses to the banks were born by the F.D.I.C. fund; correct?

A. The O.C.C. directed the banks to charge off the loans in question because they had no value. The losses, combined with other losses that the bank had incurred, rendered them insolvent, the and the F.D.I.C.—the institution was put into receivership and—by the F.D.I.C., who was charged with liquidating its assets.

Q. Okay. And when the assets were liquidated, was there some kind of deficiency?

A. I—I'm not—I don't work for the F.D.I.C., but my understanding, I think these banks were handled as a straight payout to the depositors. I don't believe anybody purchased the banks. And my reco- —my understanding is that the government—the F.D.I.C. has collected very little, if [55] anything, on the loans in question.

Q. Okay. But whatever—whatever the payout is, it —that was born by what they—the assets they liquidated and what was funded by the F.D.I.C.; correct?

A. No. The government insures deposits of up to a hundred thousand dollars. Because—the because the bank's capital was completely depleted, there was nothing here to pay off depositors.

Q. Okay.

Q. So the F.D.I.C. had to reach into the insurance fund to pay them off and then try to recover what it could by liquidating the assets.

Q. And isn't it true that the F.D.I.C. is funded by insurance premiums paid by the banks?

A. I think the insurance fund itself is funded that way. I don't know how the employees—I think the employees may be funded by congressional money.

Q. Okay. But the—at least in part, in fact, in large part, the F.D.I.C. is funded by insurance premiums paid by the banks?

A. The F.D.I.C. insurance fund is. If the fund became depleted, which it did not, then the taxpayers would foot the bill of.

Q. Yeah. And the insurance premiums, that's—that's not government money; is it?

[56] A. It is in the sense that it's turned over to the F.D.I.C., which is a government agency.

Q. Okay. But the source of the money is not from the government treasury; is it? It comes from the banks?

A. The source of any government money does not—comes from people and businesses.

Q. Well, I—

A. In my judgment it is government money. Yes.

Q. Well, okay, let me ask it this way: Isn't it true that the—that the banks pay insurance premiums which go into the F.D.I.C. fund?

A. Yes.

Q. Thank you.

CROSS-EXAMINATION (Continued)

BY MR. ROLFE:

Q. Mr. Stipano, just a copule of questions, and not to go back over everything that we've covered.

Other than, I think, some perceived differences in the degree of culpability with reference to Mr. Hudson, Baresel, and Rackley, did not treat this as one case and treat —treat these individuals and make your recommendations based on one investigation?

A. We did a single investigation. In deciding what actions were appropriate, we looked at each person individually.

Q. Okay. Was the same rationale, basically, used in your [57] judgment with reference to the actions you took?

A. I don't understand the question.

Q. The same—the same type of regulations, the matrix,—I don't want to go through the—all—everything—

A. Yes.

Q. —That Mr. Neville asked you.

A. Yes, sir. Yes, sir.

Q. Okay. I'm just asking these questions for purposes of the record, that, basically, everything you've said with reference to Mr. Hudson would pertain also to Mr. Baresel and Mr. Rackley with reference that the—the way you approached the investigation, the matrixes that were done with reference to their financial wherewithal, their culpability, the various things that went into their actions as you saw them, and I think it would be safe to say that Mr. Baresel did not agree that he caused the banks any losses either; did he?

A. I—again, there's owe a lot of questions in there.

I will say that I—I will not say that everything I said about Mr. Hudson applies to the others, as well, but what I would say is that my description of the O.C.C.'s policies and procedures, as applied to Mr. Hudson, were applied to the others, as well, and that Mr. Baresel, like the others, signed a stipulation and consent order without admitting or denying liability.

Q. Okay. And did you—did you have a chance to read Mrs. [58] Pritchett's affidavit?

A. I—I skimmed it and I read portions of it.

Q. Okay. And I believe you've commented on the—the parts that you have commented on with reference to Mr. Ogilvie's questions?

A. I made a comment concerning restitution.

MR. ROLFE: Okay. Thank you.

CROSS-EXAMINATION (Continued)

BY MR. GILE:

Q. Sir, if I asked you the same questions with regard to Mr. Rackley, would your answers be the same there also?

A. I will repeat what I said, which is that the same—my description of the policies and procedures of the O.C.C. as applied to Mr. Hudson were also applied to Mr. Rackley and Mr. Baresel.

Q. Would you agree with me that on Government's Exhibit 15, which is Mr. Rackley's February 6th, 1988, letter to Ms. Cory, that the financial statement attached thereto shows Mr. Rackley had a negative net worth of $230,990?

A. Yes, it does.

Q. Were you also aware that Mr. Rackley's—his sole profession, I believe since college, had been in the banking industry; had it not?

A. I know that he was a national bank examiner and then he worked in the banking industry.

[59] Q. Well, Mr.—he is different from Mr. Hudson and Br. Baresel in the regard they are also lawyers. You know that; do you not?

A. I am aware of that?

Q. Do you know of any other employment Mr. Rackley had except for banking since college?

A. Other than being a national bank examiner, no.

MR. GILE: Okay, thank you. That's all.

REDIRECT EXAMINATION

BY MR. OGILVIE:

Q. Mr. Stipano, would you look at the C.M.P. Matrix that is Defendants' Exhibit Number 4, please, the one you identified as having filled out.

A. Yeah. Okay.

Q. Do you recall when in the investigative process this was done?

A. This—this would have been completed shortly before going to the supervision review committee to present the findings of my investigation.

Q. And would this have been one of the—the items that you did—a task that you performed in making your recommendation to that committee?

A. Yeah, it would—it would be something that I would do in order to help formulate my recommendation.

Q. Could the S.R.C. have disagreed with the amount of civil [60] money penalty that you recommended?

A. Oh, yes.

Q. Who all else in the O.C.C., what kinds of persons would fill out a matrix like this?

A. Well, as I say, initially the—the examiner would do it. Now, in this case that didn't happen, because we were under the 1985 policy when Mr. Burch did the examinations, and also the reviewing attorney in the district would also do it, but I'm not a—I don't think that Ms. Cory did either for the same reason. If she did one, I—I don't have a recollection of her doing it. And then it would be filled out again by the attorney in the enforcement division that ultimately handles the case.

Q. Do you know whether or not the members of the supervisory review committee also fill out a matrix in helping them decide if they agree with our recommendation or not?

A. They don't—they don't fill one out. They will, typically, ask us if he filled one out and what the outcome was.

Q. You had mentioned in your testimony on direct before that there was a formal agreement in effect with respect to Hammon and Tipton; correct?

A. Yes.

Q. Could civil money penalty sanctions have been levied against these three defendants solely for violations of that agreement? Does the comptroller have that power, I mean?

[61] A. The comptroller has that power since passage of F.I.R.R.E.A. In this case, we—we could have—after F.I.R.R.EA. was passed, we could have assessed these individuals for violations of the formal agreement. Prior to F.I.R.R.E.A., we could not have.

Q. Prior to F.I.R.R.E.A., could the comptroller have made the same assessment against these three defendants if they had simply been negligent rather than willful?

A. No. We don't have the authority—our authority comes from if a person causes or brings about or participates in a violation of law or an unsafe or an unsound practice, we can assess a penalty. And by "violation of law," I mean banking—bank regulatory law. In fact,—

Q. I'm sorry. Go ahead.

A. —the law that was in effect at the time when these —when—that govern these transactions only provide that we could only assess penalties for violations of specific laws, and those laws were the National Bank Act, which are civil regulatory laws that apply to national banks, like the lending-limit statute; the Federal Reserve Act, which, again, are banking statutes that are administered primarily by Federal Reserve; and also for violations of cease—cease and desist orders. Those are the only types of things that we could assess penalties for at that time.

Q. You had also mentioned in your testimony, excuse me, there [62] was one C.M.P. policy that took effect in January of 1985; correct?

A. Yes.

Q. And that was superseded by one that took effect in January of 1988?

A. That's correct.

Q. Did Congress change the O.C.C.'s powers by statute during that period of time?

A. No.

Q. Would the O.C.C. still have the powers that it was delegated by Congress whether there was any policy in effect at any time?

A. Yes.

MR. OGILVIE: That's all I have of Mr. Stipano; Your Honor.

MR. NEVILLE: No questions, Your Honor.

MR. ROLFE: Nothing further, Your Honor.

MR. GILE: No questions.

THE COURT: Thank you. Please step down.

THE WITNESS: Thank you.

(Witness Excused)

THE COURT: Mr. Ogilvie?

MR. OGILVIE: Your Honor, I don't have any further testimony to offer the court.

I submit all of the Government's exhibits, being 1 through [63] 23, that we stipulated to earlier, and again I'll state that we stipulate to the admissibility for the court's consideration of all of the defendants exhibits, as well.

I don't have anything further of an evidentiary nature to offer the court. I have a suggestion concerning, perhaps, how—how we might proceed from here, if the court wouldn't mind my—my suggestion.

THE COURT: Before you make that suggestion, I'll be glad to hear it, plaintiff's Exhibit 1 through 24, inclusive, are admitted by stipulate without objection, and defendants' Exhibit 1 through 5, inclusive—

MR. NEVILLE: Yes, Your Honor.

THE COURT: —are also, on the same basis, admitted.

MR. OGILVIE: Your Honor, I see, at least from the Government's standpoint, that there are two fairly complicated legal issues that remain. One is whether these sanctions now, in light of the new evidence the court has received today, are punitive or remedial; and secondly, whether the actions by the O.C.C. encompass the same conduct as is mentioned in the indictment.

I recall from Your Honor's earlier ruling that that point was—was not decided by this court, and it's also mentioned in the Tenth Circuit's opinion as a finding that this court might have to determine.

[64] Because of the complexity of the—the legal principles that guide the resolution of both of those issues, my suggestion to the court would be to allow both parties a period of time to submit briefs in writing so that both sides can give this a more studied treatment than we could here in court today.

My suggestion, if the court would accommodate my schedule, since I am due to be out of town at a school next week, is to permit us two weeks from tomorrow in order to, perhaps, file simultaneous briefs on these two issues and any other issues that the court might wish to hear addressed by the parties.

Thank you, Your Honor.

Mr. NEVILLE: Your Honor, I have no objection or no problem with the suggestion by Mr. Ogilvie.

It might be helpful, and probably Mr. Marks might be overloaded, if we could have reference to the transcript, if the court thinks that that would be beneficial. I know we'd like to have—try to get a reference to the transcript before the briefing is done. We have no objection and no problem with that schedule.

I guess my question is, if that's agreeable with the court, and if so, are we talking simultaneous briefs, or how does the court wish us to proceed?

THE COURT: Well, let's talk about that.

Counsel for the defendants, are you in agreement with [65] that?

MR. ROLFE: Yes, Your Honor.

THE COURT: Mr. Gile?

MR. GILE: Yes, Your Honor.

THE COURT: My suggestion would be that we first consult with the court reporter to see what he can do to accommodate you.

The second would be whether the Government should file a brief, and I should think, for the court's purposes, it might be most useful to have, also, proposed findings of fact and conclusions of law, as we would do in a civil case, non-jury case, because, ultimately, this court must

make factual determinations and conclusions of law to satisfy the requirements of the opinion and order of the Court of Appeals. I believe, from my standpoint that would facilitate my work.

So since it is the Government's burden to establish the two findings on the two issues, wouldn't it be more orderly and in keeping with our usual procedures to have you file yours, Mr. Ogilvie, in proposed findings of fact and conclusions of law and a supporting trial brief, and then give the defendants the opportunity to respond to it. I don't think it matters much, and I think that we have a clear choice as between those two, that is, the sequential version or the simultaneous version, and I really don't care. I'm going to have to go through it anyway.

[66] What's your suggestion?

MR. OGILVIE: Your Honor, the only reason I suggested that briefs might be filed simultaneously is first, that in this hearing, unlike in many, I think the issues of fact and the issues of law are fairly well identified, since many of these issues have been addressed to this court in motions and responses before and because of the benefit of the Tenth Circuit Court's opinion. Because of those things, my suggestion was simultaneous briefs, because I gathered that we would probably all be in agreement as to what the issues are.

If the court would like for the Government to file its brief first and permit a response, I think that that would be perfectly appropriate also. I think that my concern was more the length of time to have an opportunity to do that, in a considered fashion, more so than forcing the defendants to reply to something they hadn't seen before.

THE COURT: Yes. Well, I—

MR. OGILVIE: If the court would be more inclined for me to file first and permit an opportunity for reply, I think that's appropriate also.

THE COURT: The only reason not to do that is simply it takes longer, and I know it's in everyone's inter-

est to keep the case moving and to make these determinations as soon as possible.

As I understand the testimony and the evidence, there's [67] not a lot of disagreement with regard to the factual issues. It's what those facts from the evidence constitute in contemplation of these two issues, under largely undisputed acts, whether it was punitive or solely remedial, and whether it was the same conduct to be applied.

Am I misreading this or misinterpreting it, or are we dealing with, largely, undisputed facts but hotly disputed characterizations of those facts?

MR. OGILVIE: I think that's very accurately stated, Your Honor.

MR. NEVILLE: I would agree with that, Your Honor, and I—I—the only reason I was—after hearing Mr. Ogilvie phrasing the issues, that I would prefer to go after his brief, respond to his brief, is I don't agree with exactly the issues that he's framed. We think the question before the court, setting aside the similar conduct or facts, is whether or not the Government's effort here was solely remedial. I didn't understand him exactly to say that when he postured what he viewed the issue to be. Therefore, I would prefer to respond to his brief.

THE COURT: Well, let's discuss that. Under the opinion of the Court of Appeals, must it not be solely remedial, Mr. Ogilvie? Do you have a copy of the opinion?

MR. OGILVIE: I do, Your Honor, and I'm examining the end of the court's opinion where I recalled that that statement [68] is made.

It does say that in the Court's opinion at the bottom of page 4, there must be a determination whether or not the fines are solely remedial.

THE COURT: That's the issue that I thought we were addressing.

MR. OGILVIE: I think I—I think we agree on what the issues are, although I may have phrased it in an inartful way.

THE COURT: Well, but let's be sure. That is the issue as defined by the Circuit's opinion?

MR. OGILVIE: I agree with that, Your Honor.

THE COURT: Well, if that's the case, Mr. Neville, is there any particular need or benefit to the defendants to respond rather than file simultaneous findings and briefs?

MR. NEVILLE: May I ask Mr. Rothbaum to address the court on that issue, Your Honor?

THE COURT: Yes.

MR. ROTHBAUM: Only on one point, Your Honor, the same conduct issue. This as a developing area after Halper. The same conduct issue in this case will encompass, for example, Section 93(b) the statute under which the comptroller acted here in comparison to the statutes on which the indictment has been brought. Section 93(b), in turn, encompasses all of Chapter 2 of Title 12, the National Bank Act.

[69] The only problem I see with the simultaneous brief is, without knowing the government's theory, our brief will, necessarily, be very abstract, will be a discussion of general principles of law.

THE COURT: I'm convinced, Mr. Rothbaum. Thank you.

I think that the whole goal here is to address these issues thoroughly and responsibly, and if it requires a little more investment of time, it won't be that much, and I think everyone will be better served if we invest that extra time and approach it in the sequential fashion.

So with that said, Mr. Ogilvie, when did you want your deadline to be?

MR. OGILVIE: Your Honor, I had originally asked for it to be two weeks from tomorrow. If it might—if it might be appropriate, perhaps the Court could tie the briefing schedule to the completion of the transcript by Mr. Marks. The Court, for example, might give the Government a certain amount of time after that event, whenever it might occur, and then the an appropriate response

time for the defendants after the submisison of the Government's brief or after that deadline.

THE COURT: All right, I think we'll do it this way. I'm going to recess the hearing if there's nothing further at this time. I'm going to give you gentlemen and Ms. Poarch the opportunity to speak with the court reporter to see what his schedule will permit to accommodate your needs. On that basis, [70] I'd like then to ask you to propose a briefing and submission schedule, and if it's reasonable, I'm going to approve it, and I know it will be. So talk to him, propose a schedule, and I'm sure I'll approve it, and we probably will not need to formally reconvene for that purpose.

Agreeable?

MR. OGILVIE: Yes,Your Honor.

MR. NEVILLE: Yes, Your Honor.

MR. ROLFE: Yes, sir.

THE COURT: We'll be in recess.

(Proceedings closed)

APPENDIX F

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 93-6117, 93-6123, and 93-6125

UNITED STATES OF AMERICA,
Plaintiff-Appelles,

v.

JOHN C. HUDSON, LARRY BARESEL, and
JACK BUTLER RACKLEY,
Defendants-Appellants.

Jan. 24, 1994

Before KELLY, SETH, and GOODWIN *, Circuit Judges.

SETH, Circuit Judge.

Appellants John Hudson, Larry Baresel and Jack Rackley were indicted in August 1992 for criminal law violations of 18 U.S.C. §§ 2, 371, 656 and 1005 because of their alleged mismanagement and illegal operation of several banks. These violations were based on the same lending transactions which were the subject of prior administrative sanctions imposed against the Appellants by the Comptroller of the Currency ("OCC") for violations of various federal banking laws.

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* Honorable Alfred T. Goodwin, United States Circuit Judge for the Ninth Circuit, sitting by designation.

Each Appellant moved to dismiss the indictment on double jeopardy grounds. The United States District Court for the Western District of Oklahoma consolidated and denied all three motions, and this appeal followed.

In early 1989 the OCC issued a "Notice of Assessment of a Civil Money Penalty" against the Appellants assessing civil penalties pursuant to 12 U.S.C. §§ 93(b) and 504 for alleged violations of 12 U.S.C. §§ 84 and 375b and 12 C.F.R. §§ 31.2(b) and 215.4(b). The OCC maintained that Appellants' violations caused approximately $900,000.00 in "losses". Appellant Hudson was ordered to pay $100,000.00, and Appellants Rackley and Baresel to pay $50,000.00 each. Payments were to be made to the Treasurer of the United States. Later in 1989 the OCC issued a "Notice of Intent to Prohibit Further Participation" ("Prohibition Order") to the Appellants, which sought to prevent the Appellants "from further participation, in any manner, in the conduct of the affairs of any insured depository institution." In essence, the OCC sought to prohibit Appellants from all banking activities.

As a result of the then pending OCC administrative proceedings, the Appellants entered into a Stipulation and Consent Order ("Consent Order") (October 1989) whereby Appellant Hudson consented to pay $16,500.00 and Appellants Rackley and Baresel consented to pay $15,000.00 each. The Appellants also agreed not to participate in most, if not all, banking activities unless they received prior written authorization from the OCC and the appropriate federal regulatory agency. In addition, the Consent Order at the end included a provision ("Waiver Provision") stating:

> "Respondent understands that nothing herein shall preclude any proceedings brought by the Comptroller to enforce the terms of this Stipulation and Consent, and that nothing herein constitutes, nor shall Respondent contend that it constitutes, a waiver of any right, power, or authority of any other representatives of the United States, or agencies thereof, to bring other actions deemed appropriate."

The district court concluded that Appellants made a knowing, voluntary and intelligent waiver of their double jeopardy claim by signing the Consent Order. The district court also held, "upon review of the record", that the agreed upon fines and nonparticipation sanctions were "solely" remedial. Thus the conclusion that Appellants' double jeopardy claims must fail. By basing its decision on the foregoing, the court stated that it did not consider whether the "conduct" underlying the OCC sanctions and the indictment was the same.

The first issue to be considered is whether the Waiver Provision of the Consent Order effectively cut off Appellant's rights to raise the double jeopardy defense. We review the decision of the district court on this issue *de novo*. *Larson v. Tansy*, 911 F.2d 392 (10th Cir.). To be valid waivers "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747. Moreover, because a fundamental constitutional right is at issue, we must subject the purported waiver to stringent scrutiny and "indulge every reasonable presumption against the loss of constitutional rights." *United States v. Geittmann*, 733 F.2d 1419, 1423 (10th Cir.) (quoting *Illinois v. Allen*, 397 U.S. 343, 90 S.Ct. 1057, 1060, 25 L.Ed.2d 353).

The pertinent language of the Waiver Provision provides that "nothing herein constitutes, nor shall Respondent contend that it constitutes, a waiver of any right, power, or authority of any other representatives of the United States . . . to bring other actions. . . ." This language states that the Government does not waive its rights to institute further actions against Appellants. In fact, the

Government did precisely this by filing the indictment. Contrary to the Government's position, however, the provision's language cannot reasonably be interpreted as a waiver by Appellants of their constitutional rights to raise valid defenses to the indictment. If it was the Government's intent to have Appellants waive certain rights, the Government would have phrased the Waiver Provision in terms which clearly stated that Appellants were abandoning those rights so that they could have made a voluntary, intelligent and knowing waiver. We note in passing that Article III of the Consent Order explicitly enumerated various rights and interests that were expressly waived by Appellants and that this would have been the appropriate place to create a waiver of Appellants' double jeopardy rights.

The Government would have us rely on *United States v. Marcus Schloss & Co.*, 724 F.Supp. 1123 (S.D.N.Y.), in which the court held:

> "[T]he defendant in an SEC civil proceeding who, *with knowledge of a pending criminal inquiry*, enters into a consent order explicitly recognizing the absence of any bar to criminal proceedings arising out of the same conduct, cannot subsequently advance that civil disposition, even accompanied by monetary sanctions, as the basis for a claim of double jeopardy."

Id. at 1127 (emphasis added). The problem with the Government's reliance on *Marcus Schloss* is that there is no evidence in the record before us that Appellants had knowledge of any pending criminal proceedings or inquiries. Based on the record, we hold that the Waiver Provision's protection of the Government's right and authority to bring further actions does not operate as a valid waiver by Appellants of the double jeopardy defense. The most that can be said in view of the introductory words "Respondents understand" is that they could be sued.

The remaining issue on appeal is whether the district court correctly held that Appellants were not entitled to double jeopardy protection because both the nonparticipation and the money sanctions were not punishment. The standard of review of this issue is also *de novo. United States v. Sasser*, 974 F.2d 1544, 1549 (10th Cir.).

In addressing the parties' arguments relating to the punitive nature of the civil sanctions imposed, the district court correctly relied on the Supreme Court's decision in *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487. As in *Halper*, we are concerned with the Double Jeopardy Clause's protection against multiple punishments for the same offense. Because it is indisputable that the pending criminal indictment seeks to punish the Appellants, we must determine whether the sanctions imposed pursuant to the Consent Order were "punishment" for purposes of double jeopardy analysis. The Court in *Halper* stated:

> "that in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to to the sanction, that must be evaluated."

Halper, 490 U.S. at 447 n. 7, 109 S.Ct. at 1901 n. 7.

> "To that end, the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. . . .
>
> ". . . We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. . . . [I]t follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either restrictive or deterrent purposes, is punishment,

> as we have come to understand the term. . . . We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution."

Id. at 448-49, 109 S.Ct. at 1902 (citations omitted).

Applicants contend that the above quoted language means that unless a sanction is "solely" remedial, i.e., not serving deterrent or retributive ends, it is punishment. This position is confirmed by the recent Supreme Court decision in *Austin v. United States,* —— U.S. ——, 113 S.Ct. 2801, 125 L.Ed.2d 488.

In *Austin,* the Court addressed whether a civil forfeiture was punishment for purposes of the Eighth Amendment's Excessive Fines Clause. The Court noted that "sanctions frequently serve more than one purpose" *Id.* at ——-, 113 S.Ct. at 2802. However, even if a sanction is remedial, it is still subject to the Excessive Fines Clause if "it can only be explained as serving *in part* to punish." *Id.* (emphasis added). The Court went on to quote the *Halper* decision in support of its holding that the forfeiture was punishment because it did not serve "solely" remedial purposes. *Id.* at ——. 113 S.Ct. at 4816.

Furthermore. Appellants' proposition that a sanction should be considered punishment if it is not solely remedial is supported by common sense. That is to say, if a particular remedial sanction can only be understood as also serving punitive goals, then the person subjected to the sanction has been punished despite that fact that the sanction is also remedial. To conclude otherwise effectively invalidates the Double Jeopardy Clause by allowing multiple punishments for the same conduct merely because the punishments also serve remedial purposes. We therefore

must conclude that if a sanction is not exclusively remedial, but rather can only be explained as also affecting deterrence or retribution, it is punishment for double jeopardy analysis. We are careful to note that a determination that a sanction is at least in part punishment requires that it *must* be explained as also serving as a deterrent or retribution, not merely that it *may* be so explained.

Although *Halper* dealt with the scenario where civil sanctions were meted out after a criminal prosecution, we have recognized that a civil sanction's being exacted first does not alter the applicability of *Halper. United States v. Bizzell,* 921 F.2d 263 (10th Cir.).

The Nonparticipation Sanctions

The nonparticipation sanctions were agreed to by Appellants when they signed the Consent Order. The gist of these sanctions, which were premised on 12 U.S.C. § 1818 (e), (i), was that Appellants were indefinitely barred from any further banking activities until such time as they obtained the written consent of the OCC and other appropriate regulatory agencies to reenter the banking industry. The parties are primarily concerned with § 1818(e) which provides:

> (1) Authority to issue order. Whenever the appropriate Federal banking agency determines that—
>
> (A) any institution-affiliated party has, directly or indirectly—
>
> (i) violated—-
>
> (I) any law or regulation;
>
> (ii) engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution; or
>
> . . . .

(iii) committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty;

(B) by reason of the violation, practice, or breach described in any clause of subparagraph (A)—

(i) such insured depository institution or busines institution has suffered or will probably suffer financial loss or other damages;

(ii) the interests of the insured depository institution's depositors have been or could be prejudiced; or

(iii) such party has received financial gain or other benefit by reason of such violation, practice, or breach; and

(C) such violation, practice, or breach—

(i) involves personal dishonesty on the part of such party; or

(ii) demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution or business institution.

the agency may serve upon such party a written notice of the agency's intention to remove such party from office or to prohibit any further participation by such party, in any manner, in the conduct of the affairs of any insured depository institution.

Although the Supreme Court has expressly refused to rely on statutory language as determinative of the remedial or punitive qualities of a sanction, *Halper*, 490 U.S. at 447, 109 S.Ct. at 1902 ("the labels 'criminal' and 'civil' are not a paramount importance"), "the Court did not

abandon earlier analytical framework used to determine whether a specific penalty provision may be characterized as remedial or punitive in a general sense." *United States v. WRW Corp.*, 986 F.2d 138, 140 (6th Cir.). With this in mind, Appellants argue that the express language of § 1818(e) coupled with its legislative history clearly demonstrate that the statute was intended to serve punitive goals. However, Appellants concede that § 1818(e) is also designed in part to protect the integrity of the banking system which promotes a remedial goal. While we agree that § 1818(e) may serve to punish individuals for, *inter alia*, violations of any law, it does not follow that all sanctions are necessarily presumed to be punitive when the express language, as conceded by Appellants, also allows for remedial sanctions.

We have previously addressed a similar sanction in *United States v. Bizzell*, 921 F.2d 263 (10th Cir.). In that case, the two defendants were charged by the Department of Housing and Urban Development ("HUD") with filing false statements and violating various HUD regulations. Ultimately, the defendant John Bizzell entered into a settlement agreement whereby he agreed to a two-year exclusion from HUD activities conditioned upon a payment of thirty thousand dollars. *Id.* at 265. Defendant Charles Bizzell signed a similar agreement not to participate for eighteen months. *Id.* Subsequently, defendants were indicted on numerous criminal violations related to their HUD activities. On appeal from the district court's denial of their motion for summary judgment based on double jeopardy, we hold that the "penalty of debarment is strictly remedial. . . . It is the clear intent of debarment to purge government programs of corrupt influences and to prevent improper dissipation of public funds. Removal of persons whose participation in those programs is detrimental to public purposes is remedial by definition." *Id.* at 267.

Similarly, the OCC's use of debarment as a means of protecting the integrity of the banking system and the

interests of the depositors is a legitimate remedial purpose that need not necessarily be defined as also serving as deterrence or retribution. Appellants attempt to distinguish *Bizzell* by arguing that they are barred for life as opposed to eighteen or twenty-four months. This distinction is unpersuasive because the Prohibition Order clearly states that they may again participate in banking activities if they obtain the proper consent.

Moreover, Appellants claim that the OCC's prohibition is punitive because there was a finding of scienter, i.e., that Appellants had violated a law of regulation through personal dishonesty. Again this fails because the finding by the OCC was that Appellants had "engaged in conduct or practice . . . which resulted in substantial financial loss or other damage. . . ." Prohibition Order, p. 1. The fact that Appellants' violations involved personal dishonesty is not dispositive. *See Bizzell,* 921 F.2d at 265 (defendants' sanctions based on filing false statements). While Appellants "may interpret debarment as punitive, and indeed feel as though they have been punished, debarment constitutes the 'rough remedial justice' permissible as a prophylactic governmental action." *Id.* at 267 (citation omitted).

Having reviewed the evidence surrounding Appellants' alleged misconduct and the subsequent Consent Order, we are convinced that the Government's nonparticipation sanction was solely designed to protect the integrity of the banking industry by purging the system of corrupt influences. We therefore hold that Appellants' revokable ban from further participation in banking activities is solely remedial even though it carries the sting of punishment in the eyes of Appellants.

The Money Sanctions

The prohibition sanctions were remedial, but what of the money sanctions? *Halper, Bizzell* and *WRW* addressed the situation where the sanctions allegedly exceeded the

actual damage caused by the various defendants. In the case presented herein, Appellants allegedly caused over $900,000.00 in losses, yet were originally fined $200,000.00, which was later reduced substantially by the Consent Order. From this the district court concluded:

> "It is not disputed by the defendants that 12 U.S.C. §§ 93 . . . [and 504] give the Comptroller authority to assess civil money penalties for violations. . . . As noted by the government:
>
> > "The amounts of money that may be assessed [under the statutes] is stated in terms of the number of days that each violation continues. In addition, both statutes require the OCC to take into account the financial resources and good faith of the person against whom sanctions are sought, the gravity of the violation, the history of previous violations, and any other factors that justice may require, in determining the appropriate sanction to impose.
>
> "The amounts of the agreed fines appear to be reasonable under the guidelines set forth in the statutes, and the statutes serve legitimate remedial goals."

Order, pgs. 5-6 (filed March 25, 1993) (citation omitted).

Our problem with this holding is that the district court determined only that "the statutes" are remedial. As we have stated, the fact that a statute may be remedial does not necessarily mean that sanctions imposed thereunder are solely remedial. We are also troubled by the absence of any declaration of what the precise remedial goals of the statutes are. Moreover, we disagree with the trial court's implied conclusion that the statutes are exclusively remedial because they authorize civil remedies which take into account various factors like history of violations, a party's financial resources and good faith, and the gravity of the violation. These factors are equally consistent with

a deterence determination. Thus the Government may employ these factors in order to exact an appropriate money sanction that will effectively deter a party from further wrongdoing.

Additionally, we recognize that the language of 12 U.S.C. § 504 closely parallels that of 12 U.S.C. § 93(b), and that both expressly permit civil sanctions. However, these sanctions are "money penalties" limited to a maximum of $1,000.00 per day of a continuing violation. Rather than remedying any particular loss, these statutes appear to be designed, at least in part, to punish and deter improper conduct. This is further exemplified by § 93(a) which provides that parties are personally liable for all damages caused by any knowing violations. On its face, this provision seems to remedy injured parties for losses incurred by the same conduct that is subjected to penalties pursuant to §§ 93(b) and 504.

We also conclude that the court's determination that the amounts of the fines were reasonable was without any factual support in the record. The court made no findings as to the actual losses incurred nor who may have suffered the losses, and how they compared to the sanctions imposed. In addition, even if they were reasonable, the sanctions could still be punitive. Merely because overly excessive fines may be deemed punitive, *see Halper*, 490 U.S. at 452, 109 S.Ct. at 1904, the converse is not necessarily true, i.e., a money sanction can be reasonably related to one's violations and still be used as punishment. We must therefore vacate the district court's holding concerning the money sanctions and remand for further proceedings.

In deciding whether or not the fines are solely remedial, the court must determine the precise injury caused to the Government for which the sanctions are the remedy. *See Halper*, 490 U.S. at 452, 109 S.Ct. at 1904 (on remand Government must provide accounting of actual losses). *See also* 12 U.S.C. §§ 93(b)(8) and 504(g) (monies

are to be paid to the United States Treasury). If there was no injury to be remedied, then presumably the fines were imposed to deter the Appellants from continued violations. If there was an injury, the court must determine if the fines were in fact intended solely to remedy the injury, which will include a determination whether they were reasonable. The "same conduct" issue may have to be decided. *See Burke v. Board*, 940 F.2d 1360 (10th Cir.), wherein the court decided that the two did not relate to the same offense.

Accordingly, the district court's holding on the waiver issue is REVERSED; its holding on the nonparticipation sanction issue is AFFIRMED; its decision on the money sanction issue is VACATED; and the case is REMANDED for further proceedings consistent with this opinion. IT IS SO ORDERED.

APPENDIX G

[Filed Mar. 25, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CR-92-152-T

UNITED STATES OF AMERICA,
Plaintiff,
v.
JOHN HUDSON, LARRY BARESEL, and
JACK BUTLER RACKLEY,
Defendants.

ORDER

Under consideration are the defendants' respective motions to dismiss the indictment on grounds of double jeopardy. All three defendants contend that the indictment violates the double jeopardy clause of the Fifth Amendment because civil penalties imposed by the Comptroller of the Currency constitute "punishment" and were imposed for the same offense or offenses for which the defendants now stand indicted. The government contests both the assertion that the civil penalties imposed constitute punishment and the assertion that they were imposed for the same offenses. For reasons set forth *infra*, the court concludes that the civil sanctions imposed were not "punishment" in the double jeopardy sense. Therefore, the issue of whether the offenses charged in the indictment are the same as those invoking the civil sanctions need not be addressed.

As to each defendant, the Comptroller of the Currency ("Comptroller") issued a "Notice of Assessment of a

Civil Money Penalty" on February 13, 1989 for alleged violations of 12 U.S.C. §§ 84, and 375(b), and 12 C.F.R. §§ 31.2(b) and 215.4(b). The amount of the assessment sought by the Comptroller as to the respective defendants was: (1) $100,000 assessed against John Hudson; (2) $50,000 assessed against Jack Butler Rackley, (3) $50,000 assessed against Larry Baresel.

The Comptroller also issued a "Notice of Intent to Prohibit Further Participation" to each defendant, which sought prohibition "from further participation, in any manner, in the conduct of the affairs of any insured depository institution." [1]

As a result of the civil proceedings, each defendant entered into a Stipulation and Consent Order.[2] The defendants consented to civil money penalties in the following amounts:

John Hudson	$16,500.00
Jack Rackley	$15,000.00
Larry Baresel	$15,000.00

The defendants also consented with respect to institutions and agencies set forth in the agreements,[3] that they would not:

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[1] *See* Brief in Support of Defendant Larry Baresel's Motion to Dismiss Indictment on Grounds of Double Jeopardy and Motion to Adopt Co-defendant's Plea of Double Jeopardy, Exhibit "B", p. 1; Brief in Support of Motion of Defendant Rackley to Dismiss Indictment on Grounds of Double Jeopardy, Att-2, p. 1; Brief of John Hudson in Support of Motion to Dismiss Indictment on Grounds of Double Jeopardy, Exhibit "Prohibition Notice," p. 1.

[2] *See* Brief in Support of Defendant Larry Baresel's Motion to Dismiss Indictment on Grounds of Double Jeopardy and Motion to Adopt Co-Defendant's Plea of Double Jeopardy, Exhibit "C"; Brief in Support of Motion of Defendant Rackley to Dismiss Indictment on Grounds of Double Jepardy, Att-3; Brief of John Hudson in Support of Motion to Dismiss Indictment on Grounds of Double Jeopardy, Exhibit [Stipulation and Consent Order].

[3] *Id.* at 2-4.

(a) participate in any manner in the conduct of their affairs;

(b) solicit, procure, transfer, attempt to transfer, vote or attempt to vote any proxy, consent, or authorization with respect to any voting rights;

(c) vote for a director, or serve or act as an "institution-affiliated party," as defined in 12 U.S.C. § 1813(u) (as amended); or

(d) violate any voting agreement previously approved by the "appropriate federal banking agency," as defined in 12 U.S.C. § 1813(q) (as amended); . . .[4]

Also included in the Stipulation and Consent Order as to each defendant was a provision [5] stating:

> Respondent understands that nothing herein shall preclude any proceedings brought by the Comptroller to enforce the terms of this Stipulation and Consent, and that nothing herein constitutes, nor shall Respondent contend that it constitutes, a waiver of any right, power, or authority of any other representatives of the United States, or agencies thereof, to bring other actions deemed appropriate.

In analyzing the double jeopardy question, the court looks for guidance to the seminal United States Supreme Court case of *United States v. Halper*, 490 U.S. 435 (1989). In that case the Court stated "that in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated." *Id.* at 447 n.7. The assessment of whether or not a sanction constitutes criminal punishment is set forth as follows:

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[4] *Id.* at p. 3.

[5] *Id.* at p. 5.

> In making this assessment, the labels "criminal" and "civil" are not of paramount importance. . . . [T]he determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applies in the individual case serves the goals of punishment.
>
> These goals are familiar. We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. . . . From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. . . . We therefore hold that under the Double Jeopardy Clause a defendant . . . may not be subjected to an additional . . . sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

Id. at 447-448.

Of course, in *Halper* the criminal prosecution occurred first, but its teaching is just as viable here. *See United States v. Sanchez-Escarcno*, 950 F.2d 193, 200 (5th Cir. 1991), *cert. denied*, —— U.S. ——, 113 S. Ct. 123 (1992) ("[T]he *Halper* principle that a civil penalty can be factored into the double jeopardy matrix should apply whether the civil penalty precedes or follows the criminal proceeding."); *United States v. Mayers*, 897 F.2d 1126, 1127 (11th Cir. 1990), *cert. denied*, 498 U.S. 865 (1990) (order of proceedings, civil or criminal, does not affect double jeopardy application).

Upon review of the record, it is concluded that the non-participation agreement and the agreed fines were solely

remedial. The statute authorizing the Comptroller's actions demonstrates that it is intended to maintain the integriy of the banking system. 12 U.S.C. § 1818(c)(1)(B)(c) provides in pertinent part:

> (c) Removal and prohibition authority
>
> (1) Authority to issue order. Whenever the appropriate federal banking agency determines that—
>
> (A) . . .
>
> (B) by reason of the violation, practice, or breach described in any clause of subparagraph (A)—
>
> (i) such insured depository institution or business institution has suffered or will probably suffer financial loss or other damage;
>
> (ii) the interest of the insured depository institution's depositors have been or could be prejudiced;
>
> (iii) such party has received financial gain or other benefit by reason of such violation, practice, or breach; and
>
> (C) such violation, practice or breach—
>
> (i) involves personal dishonesty on the part of such party; or
>
> (ii) demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution or business institution,
>
> the agency may serve upon such party a written notice of the agency's intention to remove such party from office or to prohibit any further participation by such party, in any manner, in the conduct of the affairs of any insured depository institution.

The court is satisfied that the agreed civil sanctions serve the legitimate governmental purpose of protecting the integrity of the banking system, and that they are remedial. While the defendants find the sanctions harsh, it is not their subjective perception that is dispositive, but rather, it is the objective purpose of the statute that counts. As is pointed out in *Halper*, 490 U.S. at 447 n.7: "This is not to say that whether a sanction constitutes punishment must be determined from the defendant's perspective. On the contrary, our cases have acknowledged that for the defendant even remedial sanctions carry the sting of punishment."

The same is, of course, true as respects the agreed money penalties. It is not disputed by the defendants that 12 U.S.C. §§ 93, 503 give the Comptroller authority to assess civil money penalties for violations. It is reiterated here that each defendant agreed to the assessment made. As noted by the government:

> The amounts of money that may be assessed [under the statutes] is stated in terms of the number of days that each violation continues. In addition, both statutes require the OCC to take into account the financial resources and good faith of the person against whom sanctions are sought, the gravity of the violation, the history of previous violations, and any other factors that justice may require, in determining the appropriate sanction to impose.

Government's Consolidated Response to Defendants' Motion to Dismiss Indictment on Grounds of Double Jeopardy, p. 10. The amounts of the agreed fines appear to be reasonable under the guidelines set forth in the statutes, and the statutes serve legitimate remedial goals. That is, civil money penalties are to be fashioned in such a way as to preclude a finding of penalty. Both statutes tie penalties to the numbers of days that violations continue, and are designed to promote the ends which the regulations seek to achieve.

In *United States v. Bizzell*, 921 F.2d 263, 267 n.5 (10th Cir. 1990), the circuit court noted respecting John Bizzell's civil money penalty that "in agreeing that the settlement did not prevent the Justice Department from pursuing criminal sanctions, Mr. Bizzell must have recognized the remedial nature of the payment." The same would be true of the defendants in this case. Moreover, the government contends that the defendants waived any double jeopardy argument based on the civil proceeding by agreeing that the civil proceedings did not constitute "a waiver of any right, power, or authority of any other representatives of the United States, or agencies thereof, to bring other actions deemed appropriate." *See* n.5, *supra.*

The court believes this provision, in and of itself, is sufficient evidence of a knowing, voluntary and intelligent waiver of any argument that the current indictment seeks a proscribed multiple punishment. *See generally United States v. Broce*, 781 F.2d 792 (10th Cir. 1986). *See also United States v. Marcus Schloss & Co., Inc.*, 724 F. Supp. 1123, 1127 (S.D.N.Y. 1989) ("I hold that the defendant in an SEC civil proceeding who, with knowledge of a pending criminal inquiry, enters into a consent order explicitly recognizing the absence of any bar to criminal proceedings arising out of the same conduct, cannot subsequently advance the civil disposition, even accompanied by monetary sanctions, as the basis for a claim of double jeopardy.").

These conclusions make unnecessary comparison of the civil complaint and indictment for purposes of determining whether the same conduct was involved.

Accordingly, the motions to dismiss the indictments on double jeopardy grounds, filed by all defendants, are deemed wholly without merit, and they are DENIED.

IT IS SO ORDERED this 25th day of March, 1993.

/s/ [Illegible]
United States District Judge

APPENDIX H

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

NOTICE OF ASSESSMENT OF A CIVIL MONEY PENALTY

To: John Hudson, Jack B. Rackley and Larry Baresel, formerly of the First National Bank of Tipton, Tipton, Oklahoma, and the First National Bank of Hammon, Hammon, Oklahoma

The Comptroller of the Currency of the United States of America (Comptroller) hereby assesses civil money penalties against John Hudson, Jack B. Rackley and Larry Baresel (Respondents), pursuant to the provisions of 12 U.S.C. §§ 93(b) and 504. These assessments are issued on the basis of the hereinafter described violations of 12 U.S.C. §§ 84, 375b and 12 C.F.R. §§ 31.2(b) and 215.4(b) which occurred at the First National Bank of Tipton, Tipton, Oklahoma (Tipton), and the First National Bank of Hammon, Hammon, Oklahoma (Hammon).

After taking into account the size of the financial resources and the good faith of Respondents, the gravity of the violations, the history of previous violations and other matters as justice may require, as required by 12 U.S.C. §§ 93(b)(2) and 504(b), and after soliciting and giving full consideration to Respondents' views with respect to these considerations, the Comptroller hereby assesses against Respondent Hudson a penalty of one hundred thousand dollars ($100,000), and against Respondents Rackley and Baresel penalties of fifty thousand dollars ($50,000) each, payable to the Treasurer of the United States.

These assessments are based on the following:

ARTICLE I

(1) Tipton and Hammon were national banking associations, chartered and examined by the Comptroller pursuant to the National Bank Act of 1864, as amended (12 U.S.C. § 1 *et seq.*).

(2) At all times relevant to the violations described below, Respondent Hudson was participating in the conduct of Tipton's and Hammon's affairs, Respondent Rackley was Tipton's president and a director at Hammon, and Respondent Baresel was a director at Tipton and Hammon. In their capacities as officers and directors, Respondents Rackley and Baresel were under a statutory and fiduciary duty to supervise Tipton's and Hammon's affairs in accordance with all applicable laws, rules and regulations.

ARTICLE II

(1) In the early 1980's Respondent Hudson became the chairman of the board and controlling shareholder of Tipton and Hammon, as well as the First State Bank, Blanchard, Oklahoma (Blanchard), the First State Bank, Granite, Oklahoma (Granite) and the First State Bank, Willow, Oklahoma (Willow), all of which have failed. In July 1983, Respondent Hudson borrowed approximately $8.4 million from MBank, Dallas, Texas (MBank) to refinance his ownership of these institutions. The notes were secured by the banks' stock, as well as other collateral.

(2) In 1984, Tipton's and Hammon's boards of directors, including Respondent Hudson, executed formal agreements with the OCC. The formal agreements addressed problems in the lending area and required the correction and prevention of violations of law.

(3) On or about June 11, 1986, Tipton made a $25,010 loan to Respondent Hudson. On or about June 27, 1986, Tipton made a $75,010 loan to Respondent Hudson.

(4) On or about March 8, 1984, Hammon made a $25,000 loan to Respondent Hudson. On or about December 31, 1985, Hammon made a $75,020 loan to Respondent Hudson.

(5) The OCC's examinations of Tipton and Hammon in 1986 disclosed numerous insider violations involving Respondent Hudson, and areas of noncompliance with the formal agreements. The September 30, 1986 Report of Supervisory Activity of Tipton (1986 Tipton ROSA) cited the bank for violations of 12 U.S.C. §§ 375a and 375b, and 12 C.F.R. § 31.2. The September 30, 1968 Report of Supervisory Activity of Hammon (1986 Hammon ROSA) cited the bank for violations of 12 U.S.C. § 375a and 12 C.F.R. § 31.2. The details of these violations are specifically set forth in the 1986 Tipton ROSA and the 1986 Hammon ROSA, which are incorporated herein by reference the same as if fully set forth.

(6) In 1986, Respondent Hudson defaulted on his bank stock loans at MBank. On August 8, 1986, Respondent Hudson resigned as a director of Tipton. Respondent Hudson also resigned as a director of Hammon during the September 30, 1986 examination and was replaced by Respondent Rackley. In October 1986, Rackley became Tipton's president.

(7) In the fall of 1986, Respondent Hudson contacted Claude Cypert, an Oklahoma businessman, to solicit his interest in representing a group of investors known as Macao Investment Company (Macao) who were allegedly interested in purchasing Respondent Hudson's bank stock notes at MBank. Macao's corporate records indicate that Respondent Hudson is Macao's president and a major shareholder. Respondent Hudson did not disclose the name of the group or his involvement in it to Cypert. In exchange for an option to purchase a five percent interest in Tipton and Hammon, and a bus to be donated to the Southern Nazarene University, Cypert agreed to represent the group in its dealings with MBank.

(8) On or about December 1, 1986, Respondent Hudson and MBank entered into a settlement agreement whereby MBank was given the right to sell the bank stock securing Respondent Hudson's notes. The settlement agreement provided that after the sale of the bank stock, Respondent Hudson would be liable to MBank for any deficiency up to $2.75 million. The agreement further provided that Respondent Hudson would sell his interest in Blanchard to his father-in-law, Jack Marshall, and resign as a director of all the banks and their holding companies.

(9) In December 1986, MBank agreed to sell Tipton and Hammon notes, with an underlying interest in the bank stock, to Cypert for $400,000. The deal was scheduled for closing on December 30, 1986 in Dallas.

(10) Between December 29 and 31, 1986, Tipton, Hammon and Blanchard made a total of eight unsecured loans to various nominee borrowers listed under subparagraphs (a)-(h) below. Except where noted, the proceeds of these loans, totaling $540,000, were deposited in an account of SKL, Inc. (SKL) at the Century National Bank, Oklahoma City, Oklahoma (Century). $400,000 of the proceeds were subsequently transferred by cashier's check to Macao. The remaining $140,000 was transferred back to Tipton, along with the proceeds of a $60,000 loan from Hammon to Hurley Financial Corporation (Hurley), to reimburse Tipton for $100,000 loans to Hurley and SKL which were not booked. The amounts, granting banks, borrowers' names and dates of the nominee loans are as follows:

(a) $20,000 loan from Tipton to Respondent Rackley on or about December 29, 1986;

(b) $90,000 loan from Tipton to SKL on or about December 30, 1986;

(c) $100,000 loan from Tipton to Hurley on or about December 3, 1986 (not booked);

(d) $100,000 loan from Tipton to SKL on or about December 30, 1986 (not booked);

(e) $90,000 loan from Hammon to Respondent Rackley on or about December 31, 1986 (only $40,000 was deposited in SKL's account at Century);

(f) $90,000 loan from Hammon to SKL on or about December 31, 1986;

(g) $60,000 loan from Hammon to Hurley on or about December 31, 1986 (proceeds were transferred back to Tipton, to partially reimburse the bank for the $100,000 loans to Hurley and SKL which were not booked);

(h) $100,000 loan from Blanchard to SKL on or about December 29, 1986.

(11) The loans set forth in paragraph (10) above were made on the basis of virtually no credit information or other documentation from the borrowers. Respondent Rackley was the loan officer for all the nominee loans at Tipton and Hammon, except for the loans to himself. As directors, Respondents Rackley and Baresel approved the loans at Tipton and Hammon, although Respondent Rackley abstained from voting on his own notes.

(12) On or about December 30, 1986, Respondent Baresel delivered a $400,000 cashier's check from Macao, payable to Cypert. The check represented the proceeds of the nominee loans made at Tipton, Hammon and Blanchard set forth in paragraph (10) above. Cypert exchanged the cashier's check from Macao for his own $400,000 cashier's check payable to MBank and, on December 30, flew to Dallas with Respondent Baresel where they met with MBank officials. Cypert exchanged the $400,000 cashier's check for the Tipton and Hammon notes and underlying stock interest. Shortly thereafter, Cypert assigned his interest in the notes and stock to

Macao and gave the assignment, notes and stock to Respondent Baresel.

(13) In February 1987, MBank agreed to sell the Willow and Granite notes, with an underlying interest in the bank stock, some additional corporate stock and a real estate mortgage held as collateral, to Cypert for $750,000. The deal was scheduled for closing on February 27, 1987 in Dallas.

(14) Between February 23 and 27, 1987, Tipton, Hammon, Blanchard and the First National Bank of Del City, Del City, Oklahoma (Del City) made a total of ten unsecured loans to various borrowers listed under subparagraphs (a)-(j) below. Except where noted, the proceeds of these loans, totaling $520,000, were deposited in SKL's account at Century and subsequently transferred by cashier's check to Macao. The amounts, granting banks, borrowers' names and dates of the nominee loans are as follows:

(a) $60,000 loan from Tipton to Tom Lucas on or about February 23, 1987;

(b) $93,000 loan from Tipton to Jack Marshall on or about February 24, 1987 (only $65,351 was deposited in SKL's account at Century; the remaining $27,649 was used to make a payment on one of Respondent Hudson's loans at the Peoples State Bank, Claremore, Oklahoma (Peoples));

(c) $30,000 loan from Tipton to David Tuck on or about February 25, 1987;

(d) $92,000 loan from Hammon to Jack Marshall on or about February 24, 1987 (only $64,649 was deposited in SKL's account at Century; the remaining $27,351 was used to make a payment on one of Respondent Hudson's loans at Peoples);

(e) $20,000 loan from Hammon to David Tuck on or about February 27, 1987;

(f) $10,000 loan from Hammon to Sharon Matthews on or about February 27, 1987;

(g) $40,000 loan from Blanchard to Tom Lucas on or about February 26, 1987;

(h) $60,000 loan from Blanchard to Respondent Rackley on or about February 26, 1987;

(i) $100,000 loan from Blanchard to Partridge Capital Corp., on or about February 26, 1987;

(j) $70,000 loan from Del City to SKL on or about February 25, 1987.

(15) In addition to the loans set forth in paragraph (14) above, Tipton made a $50,000 loan to H.H. Clifford on or about February 25, 1987. The proceeds of this loan were transferred to Executive Bank Management Services, Inc., a company controlled by Respondent Hudson. Respondent Hudson used the proceeds to purchase a $50,000 cashier's check payable to Macao.

(16) Tipton also made a $90,000 loan to Cypert on or about February 19, 1987, and Hammon made a $90,000 loan to Cypert on or about February 27, 1987.

(17) The loans set forth in paragraphs (14) through (16) above were made on the basis of virtually no credit information or other documentation from the borrowers. Respondent Rackley was the loan officer for all of the nominee loans at Tipton and Hammon, except for the $92,000 loan from Hammon to Jack Marshall. As directors, Respondents Rackley and Baresel approved the loans at Tipton and Hammon, although Respondent Rackley abstained from voting on his own notes.

(18) On or about February 27, 1987, Respondent Baresel delivered a $570,000 cashier's check from Macao,

payable to Cypert. The check represented the proceeds of the nominee loans made at Tipton, Hammon, Blanchard and Del City set forth in paragraphs (14) and (15) above. Cypert exchanged the $570,000 cashier's check and the proceeds of the two $90,000 loans from Tipton and Hammon for a $750,000 cashier's check payable to MBank. On February 27, 1987, Cypert and Respondent Baresel flew to Dallas where they again met with MBank officials. Cypert exchanged the $750,000 cashier's check for the Willow and Granite notes, underlying stock interests, and assignment of the real estate mortgage. At the request of Respondents Hudson and Baresel, Cypert reassigned the real estate mortgage to Blanchard where it was used to provide security for one of Respondent Hudson's loans.

(19) Respondent Hudson directly benefited from the nominee loans at Tipton and Hammon that were used to purchase his bank stock notes at MBank. Respondent Hudson also directly benefited from the portions of the Jack Marshall loans from Tipton and Hammon that were used to make a payment on one of his loans at Peoples. Those loans are therefore attributable to him for lending limit purposes pursuant to 12 C.F.R. § 32.5(a)(1). At Tipton, the $2[illegible],000 advance to Respondent Rackley on December 29, 1986, when combined with Respondent Hudson's existing advances, first caused the line to exceed the bank's legal lending limit set forth at 12 U.S.C. § 84(a)(1). Total advances attributable to Respondent Hudson equaled $533,020 at Tipton, which exceeded the lending limit by $437,509. At Hammon, the $60,000 advance to Hurley and the $90,000 advances to SKL and Respondent Rackley on December 31, 1986, when combined with Respondent Hudson's existing advances, first caused the line to exceed the bank's lending limit. Total advances attributable to Respondent Hudson equaled $502,020 at Hammon, which exceeded the lending limit by $407,792.

(20) The nominee loans at Tipton and Hammon are also attributable to Respondent Hudson for purposes of 12 U.S.C. § 375b, and 12 C.F.R. §§ 31.2(b) and 215.4(b), pursuant to 12 U.S.C. §§ 31.3 and 215.3(f). At Tipton, the loans to Clifford, Cypert, Lucas, Marshall, SKL and Tuck were made at a time when Respondent Hudson's aggregate indebtedness exceeded five percnt of capital and surplus, but did not receive prior board approval, in violation of 12 U.S.C. § 375b(2) and 12 C.F.R. §§ 31.2 (b)(1) and 215.4(b)(1)(i). At Hammon, the loans to Cypert, Marshall, Matthews and Tuck were made at a time when Respondent Hudson's aggregate indebtedness exceeded five percent of capital and surplus, but did not receive prior board approval, in violation of 12 U.S.C. § 375b(2) and 12 C.F.R. §§ 31.2(b)(1) and 215.4 (b)(1)(i).

(21) The violations set forth in paragraphs (19) and (20) above were uncorrected at the close of the May 31, 1987 examination of Tipton and the June 30, 1987 examination of Hammon. The violations resulted in losses of approximately $456,000 at Tipton and $437,000 at Hammon. The losses contributed to the banks' failures on September 3, 1987. Further details of the violations are specifically set forth in the Report of Supervisory Activity of Tipton dated May 31, 1987 (1987 Tipton ROSA) and the Report of Supervisory Activity of Hammon dated June 30, 1987 (1987 Hammon ROSA). The 1987 Tipton ROSA and 1987 Hammon ROSA are incorporated herein by reference the same as if fully set forth.

WHEREFORE, the Comptroller, through his authorized representative whose hand appears below, hereby assesses the above-described penalties, effective immediately.

TAKE NOTICE, Respondents are hereby afforded the opportunity for a hearing before the Comptroller concerning these assessments, pursuant to 12 U.S.C. §§ 93(b)(3) and 504(c), *if a request for such a hearing is made within*

ten (10) days after service of this Notice of Assessment. Any request for such hearing shall be filed with the Hearing Clerk, Office of the Chief Counsel, Office of the Comptroller of the Currency, Washington, D.C. 20219, and such hearing shall be conducted pursuant to 12 C.F.R. § 19.23 which requires Respondents to file an answer to this Notice of Assessment.

If Respondents fail to request a hearing within the above ten (10) day period, these assessments shall constitute final and unappealable orders against them, pursuant to 12 U.S.C. §§ 93(b)(3) and 504(c).

Remittance of these civil money penalties shall be payable to the Treasurer of the United States and delivered to the Hearing Clerk, Office of the Chief Counsel, Office of the Comptroller of the Currency, Washington, D.C. 20219.

Please note that, pursuant to 12 C.F.R. § 7.5217(b), the banks may not pay any civil money penalty or expenses or other payments, including legal fees, incurred with respect to the civil money penalty actions against the Respondents and the Respondents may not seek such reimbursement.

Pursuant to 12 C.F.R. § 19.10(c), the Comptroller may, in his discretion, order that a public hearing be held if he determines that it is necessary to protect the public interest. Respondents are hereby afforded an opportunity to submit their views as to whether a public hearing would be in the public interest in this case.

IN WITNESS WHEREOF, my hand this 13 day of Feb., 1989.

/s/ Dean S. Marriott
DEAN S. MARRIOTT
Senior Deputy Comptroller
for Bank Supervision

APPENDIX I

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

IN THE MATTER OF JOHN HUDSON
FIRST NATIONAL BANK OF TIPTON, TIPTON, OKLAHOMA
FIRST NATIONAL BANK OF HAMMON,
HAMMON, OKLAHOMA

NOTICE OF INTENTION TO PROHIBIT
FURTHER PARTICIPATION

To: John Hudson, formerly of the First National Bank of Tipton, Tipton, Oklahoma, and the First National Bank of Hammon, Hammon, Oklahoma

TAKE NOTICE, that on the 2nd day of October, 1989, a hearing will commence at 10:00 a.m. in the United States Courthouse for the Western District of Oklahoma, Oklahoma City, Oklahoma, pursuant to the Federal Deposit Insurance Act, as amended, 12 U.S.C. § 1818(e), (i) concerning the charges set forth herein to determine whether an Order should be issued against John Hudson (Respondent) prohibiting him from further participation, in any manner, in the conduct of the affairs of any insured-depository institution.

After examination and investigation into the affars of the First National Bank of Tipton, Tipton, Oklahoma (Tipton) and the First National Bank of Hammon, Hammon, Oklahoma (Hammon), the Comptroller of the Currency of the United States of America (Comptroller) is

of the opinion that Respondent has engaged in conduct or practice with respect to such banks which resulted in substantial financial loss or other damage, has evidenced his personal dishonesty and a willful and continuing disregard for such banks' safety and soundness and, in addition, has evidenced his unfitness to participate, in any manner, in the conduct of the affairs of any depository institution.

THEREFORE TAKE NOTICE of the Comptroller's intention to prohibit Respondent from further participation, in any manner, in the conduct of the affairs of any insured depository institution, pursuant to 12 U.S.C. § 1818(e), (i). In support of this Notice of Intention to Prohibit Further Participation (Notice), the Comptroller charges the following:

ARTICLE I

(1) Tipton and Hammon were national banking associations, chartered and examined by the Comptroller pursuant to the National Bank Act of 1864, as amended (12 U.S.C. § 1 *et seq.*).

(2) At all times relevant to the violations described below, Respondent was participating in the conduct of Tipton's and Hammon's affairs.

(3) Tipton and Hammon were declared insolvent by the Comptroller on September 3, 1987. The Comptroller has jurisdiction to issue this Notice under 12 U.S.C. § 1818(i)(3), which provides the Comptroller with authority to prohibit an individual who has become separated from a national banking association from participating in the affairs of any depository institution.

ARTICLE II

(1) In the early 1980's, Respondent became the chairman of the board and controlling shareholder of Tipton and Hammon, as well as the First State Bank, Blanchard,

Oklahoma (Blanchard), the First State Bank, Granite, Oklahoma (Granite) and the First State Bank, Willow, Oklahoma (Willow), all of which have failed. In July 1983, Respondent borrowed approximately $8.4 million from MBank, Dallas, Texas (MBank) to refinance his ownership of these institutions. The notes were secured by the banks' stock, as well as other collateral.

(2) In 1984, Tipton's and Hammon's boards of directors, including Respondent, executed formal agreements with the OCC. The formal agreements addressed problems in the lending area and required the correction and prevention of violations of law.

(3) On or about June 11, 1986, Tipton made a $25,010 loan to Respondent. On or about June 27, 1986, Tipton made a $75,010 loan to Respondent.

(4) On or about March 8, 1984, Hammon made a $25,000 loan to Respondent. On or about December 31, 1985, Hammon made a $75,020 loan to Respondent.

(5) The OCC's examinations of Tipton and Hammon in 1986 disclosed numerous insider violations involving Respondent, and areas of noncompliance with the formal agreements. The September 30, 1986 Report of Supervisory Activity of Tipton (1986 Tipton ROSA) cited the bank for violations of 12 U.S.C. §§ 375a and 375b, and 12 C.F.R. § 31.2. The September 30, 1986 Report of Supervisory Activity of Hammon (1986 Hammon ROSA) cited the bank for violations of 12 U.S.C. § 375a and 12 C.F.R. § 31.2. The details of these violations are specifically set forth in the 1986 Tipton ROSA and the 1986 Hammon ROSA, which are incorporated herein by reference the same as if fully set forth.

(6) In 1986, Respondent defaulted on his bank stock loans at MBank. On August 8, 1986, Respondent resigned as a director of Tipton. Respondent also resigned as a director of Hammon during the September 30, 1986

examination and was replaced by Jack B. Rackley. In October 1986, Rackley became Tipton's president.

(7) In the fall of 1986, Respondent contacted Claud Cypert, an Oklahoma businessman, to solicit his interest in representing a group of investors known as Macao Investment Company (Macao) who were allegedly interested in purchasing Respondent's bank stock notes at MBank. Macao's corporate records indicate that Respondent is Macao's president and a major shareholder. Respondent did not disclose the name of the group or his involvement in it to Cypert. In exchange for an option to purchase a five percent interest in Tipton and Hammon, and a bus to be donated to the Southern Nazarene University, Cypert agreed to represent the group in its dealings with MBank.

(8) On or about December 1, 1986, Respondent and MBank entered into a settlement agreement whereby MBank was given the right to sell the bank stock securing Respondent's notes. The settlement agreement provided that after the sale of the bank stock, Respondent would be liable to MBank for any deficiency up to $2.75 million. The agreement further provided that Respondent would sell his interest in Blanchard to his father-in-law, Jack Marshall, and resign as a director of all the banks and their holding companies.

(9) In December 1986, MBank agreed to sell the Tipton and Hammon notes, with an underlying interest in the bank stock, to Cypert for $400,000. The deal was scheduled for closing on December 30, 1986 in Dallas.

(10) Between December 29 and 31, 1986, Tipton, Hammon and Blanchard made a total of eight unsecured loans to various nominee borrowers listed under subparagraphs (a)-(h) below. Except where noted, the proceeds of these loans, totaling $540,000, were deposited in an account of SKL, Inc. (SKL) at the Century National Bank, Oklahoma City, Oklahoma (Century). $400,000

of the proceeds were subsequently transferred by cashier's check to Macao. The remaining $140,000 was transferred back to Tipton, along with the proceeds of a $60,000 loan from Hammon to Hurley Financial Corporation (Hurley), to reimburse Tipton for $100,000 loans to Hurley and SKL which were not booked. The amounts, granting banks, borrowers' names and dates of the nominee loans are as follows:

(a) $20,000 loan from Tipton to Rackley on or about December 29, 1986;

(b) $90,000 loan from Tipton to SKL on or about December 30, 1986;

(c) $100,000 loan from Tipton to Hurley on or about December 30, 1986 (not booked);

(d) $100,000 loan from Tipton to SKL on or about December 30, 1986 (not booked);

(e) $90,000 loan from Hammon to Rackley on or about December 31, 1986 (only $40,000 was deposited in SKL's account at Century);

(f) $90,000 loan from Hammon to SKL on or about December 31, 1986;

(g) $60,000 loan from Hammon to Hurley on or about December 31, 1986 (proceeds were transferred back to Tipton, to partially reimburse the bank for the $100,000 loans to Hurley and SKL which were not booked);

(h) $100,000 loan from Blanchard to SKL on or about December 29, 1986.

(11) The loans set forth in pragraph (10) above were made on the basis of virtually no credit information or other documentation from the borrowers. Rackley was the loan officer for all of the nominee loans at Tipton and Hammon, except for the loans to himself. As directors,

Rackley and Larry Baresel approved the loans at Tipton and Hammon, although Rackley abstained from voting on his own notes.

(12) On or about December 30, 1986, Baresel delivered a $400,000 cashier's check from Macao, payable to Cypert. The check represented the proceeds of the nominee loans made at Tipton, Hammon and Blanchard set forth in paragraph (10) above. Cypert exchanged the cashier's check from Macao for his own $400,000 cashier's check payable to MBank and, on December 30, flew to Dallas with Baresel where they met with MBank officials. Cypert exchanged the $400,000 cashier's check for the Tipton and Hammon notes and underlying stock interest. Shortly thereafter, Cypert assigned his interest in the notes and stock to Macao and gave the assignment, notes and stock to Baresel.

(13) In February 1987, MBank agreed to sell the Willow and Granite notes, with an underlying interest in the bank stock, some additional corporate stock and a real estate mortgage held as collateral, to Cypert for $750,000. The deal was scheduled for closing on February 27, 1987 in Dallas.

(14) Between February 23 and 27, 1987, Tipton, Hammon, Blanchard and the First National Bank of Del City, Del City, Oklahoma (Del City) made a total of ten unsecured loans to various borrowers listed under subparagraphs (a)-(j) below. Except where noted, the proceeds of these loans, totaling $520,000, were deposited in SKL's account at Century and subsequently transferred by cashier's check to Macao. The amounts, granting banks, borrowers' names and dates of the nominee loans are as follows:

(a) $60,000 loan from Tipton to Tom Lucas on or about February 23, 1987;

(b) $93,000 loan from Tipton to Jack Marshall on or about February 24, 1987 (only $65,351 was

deposited in SKL's account at Century; the remaining $27,649 was used to make a payment on one of Respondent's loans at the Peoples State Bank, Claremore, Oklahoma (Peoples));

(c) $30,000 loan from Tipton to David Tuck on or about February 25, 1987;

(d) $92,000 loan from Hammon to Jack Marshall on or about February 24, 1987 (only $64,649 was deposited in SKL's account at Century; the remaining $27,351 was used to make a payment on one of Respondent's loans at Peoples);

(e) $20,000 loan from Hammon to David Tuck on or about February 27, 1987;

(f) $10,000 loan from Hammon to Sharon Matthews on or about February 27, 1987;

(g) $40,000 loan from Blanchard to Tom Lucas on or about February 26, 1987;

(h) $60,000 loan from Blanchard to Rackley on or about February 26, 1987;

(i) $100,000 loan from Blanchard to Partridge Capital Corp., on or about February 26, 1987;

(j) $70,000 loan from Del City to SKL on or about February 25, 1987.

(15) In addition to the loans set forth in paragraph (14) above, Tipton made a $50,000 loan to H.H. Clifford on or about February 25, 1987. The proceeds of this loan were transferred to Executive Bank Management Services, Inc., a company controlled by Respondent. Respondent used the proceeds to purchase a $50,000 cashier's check payable to Macao.

(16) Tipton also made a $90,000 loan to Cypert on or about February 19, 1987, and Hammon made a $90,000 loan to Cypert on or about February 27, 1987.

(17) The loans set forth in paragraphs (14) through (16) above were made on the basis of virtually no credit information or other documentation from the borrowers. Rackley was the loan officer for all of the nominee loans at Tipton and Hammon, except for the $92,000 loan from Hammon to Jack Marshall. As directors, Rackley and Baresel approved the loans at Tipton and Hammon, although Rackley abstained from voting on his own notes.

(18) On or about February 27, 1987, Baresel delivered a $570,000 cashier's check from Macao, payable to Cypert. The check represented the proceeds of the nominee loans made at Tipton, Hammon, Blanchard and Del City set forth in paragraphs (14) and (15) above. Cypert exchanged the $570,000 cashier's check and the proceeds of the two $90,000 loans from Tipton and Hammon for a $750,000 cashier's check payable to MBank. On February 27, 1987, Cypert and Baresel flew to Dallas where they again met with MBank officials. Cypert exchanged the $750,000 cashier's check for the Willow and Granite notes, underlying stock interests, and assignment of the real estate mortgage. At the request of Respondent and Baresel, Cypert reassigned the real estate mortgage to Blanchard where it was used to provide security for one of Respondent's loans.

(19) Respondent directly benefited from the nominee loans at Tipton and Hammon that were used to purchase his bank stock notes at MBank. Respondent also directly benefited from the portions of the Jack Marshall loans from Tipton and Hammon that were used to make a payment on one of his loans at Peoples. Those loans are therefore attributable to him for lending limit purposes pursuant to 12 C.F.R. § 32.5(a)(1). At Tipton, the $20,000 advance to Rackley on December 29, 1986, when combined with Respondent's existing advances, first caused the line to exceed the bank's legal lending limit set forth at 12 U.S.C. § 84(a)(1). Total advances attributable to Respondent equaled $533,020 at Tipton, which

exceeded the lending limit by $437,509. At Hammon, the $60,000 advance to Hurley and the $90,000 advances to SKL and Rackley on December 31, 1986, when combined with Respondent's existing advances, first caused the line to exceed the bank's lending limit. Total advances attributable to Respondent equaled $502,020 at Hammon, which exceeded the lending limit by $407,792.

(20) The nominee loans at Tipton and Hammon are also attributable to Respondent for purposes of 12 U.S.C. § 375b, and 12 C.F.R. §§ 31.2(b) and 215.4(b), pursuant to 12 U.S.C. §§ 31.3 and 215.3(f). At Tipton, the loans to Clifford, Cypert, Lucas, Marshall, SKL and Tuck were made at a time when Respondent's aggregate indebtedness exceeded five percent of capital and surplus, but did not receive prior board approval, in violation of 12 U.S.C. § 375b(2) and 12 C.F.R. §§ 31.2(b)(1) and 215.4(b)(1)(i). At Hammon, the loans to Cypert, Marshall, Matthews and Tuck were made at a time when Respondent's aggregate indebtedness exceeded five percent of capital and surplus, but did not receive prior board approval, in violation of 12 U.S.C. § 375b(2) and 12 C.F.R. §§ 31.2(b)(1) and 215.4(b)(1)(i).

(21) The violations set forth in paragraphs (19) and (20) above were uncorrected at the close of the May 31, 1987 examination of Tipton and the June 30, 1987 examination of Hammon. The violations resulted in losses of approximately $456,000 at Tipton and $437,000 at Hammon. The losses contributed to the banks' failures on September 3, 1987. Further details of the violations are specifically set forth in the Report of Supervisory Activity of Tipton dated May 31, 1987 (1987 Tipton ROSA) and the Report of Supervisory Activity of Hammon dated June 30, 1987 (1987 Hammon ROSA). The 1987 Tipton ROSA and 1987 Hammon ROSA are incorporated herein by reference the same as if fully set forth.

ARTICLE III

(1) The actions of Respondent described in Article II, paragraphs (1) through (21) above demonstrate that Respondent has engaged in conduct or practice with respect to Tipton and Hammon which resulted in substantial financial loss or other damage, has evidenced his personal dishonesty and a willful and continuing disregard for such banks' safety and soundness and, in addition, has evidenced his unfitness to participate, in any manner, in the conduct of the affairs of any insured depository institution.

THEREFORE, Respondent is directed to file an answer in writing to the charges contained herein with the Hearing Clerk, Office of the Chief Counsel, Office of the Comptroller of the Currency, Washington, D.C. 20219, within twenty (20) days from the date of service of this Notice, in accordance with 12 C.F.R. Part 19.

Pursuant to 12 U.S.C. § 1818(h)(1) and 12 C.F.R. § 19.10(c), the Comptroller may, in his discretion, order that a public hearing be held if he determines that it is necessary to protect the public interest. Respondent is hereby afforded an opportunity to submit his views as to whether a public hearing would be in the public interest in this case.

WITNESS, my hand on behalf of the Office of the Comptroller of the Currency, given at Washington, D.C. the 31st day of August, 1989.

/s/ Dean S. Marriott
DEAN S. MARRIOTT
Senior Deputy Comptroller
for Bank Supervision

APPENDIX J

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER
OF THE CURRENCY

IN THE MATTER OF LARRY BARESEL
FIRST NATIONAL BANK OF TIPTON, TIPTON, OKLAHOMA,
FIRST NATIONAL BANK OF HAMMON,
HAMMON, OKLAHOMA

NOTICE OF INTENTION TO
PROHIBIT FURTHER PARTICIPATION

To: Larry Baresel, formerly of the First National Bank of Tipton, Tipton, Oklahoma, and the First National Bank of Hammon, Hammon, Oklahoma

TAKE NOTICE, that on the 2nd day of October, 1989, a hearing will commence at 10:00 a.m. in the United States Courthouse for the Western District of Oklahoma, Oklahoma City, Oklahoma, pursuant to the Federal Deposit Insurance Act, as amended, 12 U.S.C. § 1818(e), (i) concerning the charges set forth herein to determine whether an Order should be issued against Larry Baresel (Respondent) prohibiting him from further participation, in any manner, in the conduct of the affairs of any insured depository institution.

After examination and investigation into the affairs of the First National Bank of Tipton, Tipton, Oklahoma (Tipton) and the First National Bank of Hammon, Hammon, Oklahoma (Hammon), the Comptroller of the Currency of the United States of America (Comptroller) is of the opinion that Respondent has committed violations

of law and engaged in unsafe and unsound practices at such banks which resulted in substantial financial loss or other damage and serious prejudice to the interests of the depositors. The Comptroller has further determined that the violations and practices involve personal dishonesty on Respondent's part and demonstrate a willful and continuing disregard for the banks' safety and soundness.

THEREFORE TAKE NOTICE of the Comptroller's intention to prohibit Respondent from further participation, in any manner, in the conduct of the affairs of any insured depository institution, pursuant to 12 U.S.C. § 1818(e), (i). In support of this Notice of Intention to Prohibit Further Participation (Notice), the Comptroller charges the following:

ARTICLE I

(1) Tipton and Hammon were national banking associations, chartered and examined by the Comptroller pursuant to the National Bank Act of 1864, as amended (12 U.S.C. § 1 *et seq.*).

(2) At all times relevant to the violations described below, Respondent was a director of Tipton and Hammon. In his capacity as a director, Respondent was under a statutory and fiduciary duty to supervise the banks' affairs in accordance with all applicable laws, rules and regulations.

(3) Tipton and Hammon were declared insolvent by the Comptroller on September 3, 1987. The Comptroller has jurisdiction to issue this Notice under 12 U.S.C. § 1818(i)(3), which provides the Comptroller with authority to prohibit an individual who has become separated from a national banking association from participating in the affairs of any depository institution.

ARTICLE II

(1) In the early 1980's, John Hudson became the chairman of the board and controlling shareholder of

Tipton and Hammon, as well as the First State Bank, Blanchard, Oklahoma (Blanchard), the First State Bank, Granite, Oklahoma (Granite) and the First State Bank, Willow, Oklahoma (Willow), all of which have failed. In July 1983, Hudson borrowed approximately $8.4 million from MBank, Dallas, Texas (MBank) to refinance his ownership of these institutions. The notes were secured by the banks' stock, as well as other collateral.

(2) In 1984, Tipton's and Hammon's boards of directors, including Hudson, executed formal agreements with the OCC. The formal agreements addressed problems in the lending area and required the correction and prevention of violations of law.

(3) On or about June 11, 1986, Tipton made a $25,010 loan to Hudson. On or about June 27, 1986, Tipton made a $75,010 loan to Hudson.

(4) On or about March 8, 1984, Hammon made a $25,000 loan to Hudson. On or about December 31, 1985, Hammon made a $75,020 loan to Hudson.

(5) The OCC's examinations of Tipton and Hammon in 1986 disclosed numerous insider violations involving Hudson, and areas of noncompliance with the formal agreements. The September 30, 1986 Report of Supervisory Activity of Tipton (1986 Tipton ROSA) cited the bank for violations of 12 U.S.C. §§ 375a and 375b, and 12 C.F.R. § 31.2. The September 30, 1986 Report of Supervisory Activity of Hammon (1986 Hammon ROSA) cited the bank for violations of 12 U.S.C. § 375a and 12 C.F.R. § 31.2. The details of these violations are specifically set forth in the 1986 Tipton ROSA and the 1986 Hammon ROSA, which are incorporated herein by reference the same as if fully set forth.

(6) In 1986, Hudson defaulted on his bank stock loans at MBank. On August 8, 1986, Hudson resigned as a director of Tipton. Hudson also resigned as a director of Hammon during the September 30, 1986 examination and

was replaced by Jack B. Rackley. In October 1986, Rackley became Tipton's president.

(7) In the fall of 1986, Hudson contacted Claud Cypert, an Oklahoma business, to solicit his interest in representing a group of investors known as Macao Investment Company (Macao) who were allegedly interested in purchasing Hudson's bank stock notes at MBank. Macao's corporate records indicate that Hudson is Macao's president and a major shareholder. Hudson did not disclose the name of the group or his involvement in it to Cypert. In exchange for an option to purchase a five percent interest in Tipton and Hammon, and a bus to be donated to the Southern Nazarene University, Cypert agreed to represent the group in its dealings with MBank.

(8) On or about December 1, 1986, Hudson and MBank entered into a settlement agreement whereby MBank was given the right to sell the bank stock securing Hudson's notes. The settlement agreement provided that after the sale of the bank stock, Hudson would be liable to MBank for any deficiency up to $2.75 million. The agreement further provided that Hudson would sell his interest in Blanchard to his father-in-law, Jack Marshall, and resign as a director of all the banks and their holding companies.

(9) In December 1986, MBank agreed to sell the Tipton and Hammon notes, with an underlying interest in the bank stock, to Cypert for $400,000. The deal was scheduled for closing on December 30, 1986 in Dallas.

(10) Between December 29 and 31, 1986, Tipton, Hammon and Blanchard made a total of eight unsecured loans to various nominee borrowers listed under subparagraphs (a)-(h) below. Except where noted, the proceeds of these loans, totaling $540,000, were deposited in an account of SKL, Inc. (SKL) at the Century National Bank, Oklahoma City, Oklahoma (Century). $400,000 of the proceeds were subsequently transferred by cashier's check to Macao. The remaining $140,000 was transferred

back to Tipton, along with the proceeds of a $60,000 loan from Hammon to Hurley Financial Corporation (Hurley), to reimburse Tipton for $100,000 loans to Hurley and SKL which were not booked. The amounts, granting banks, borrowers' names and dates of the nominee loans are as follows:

(a) $20,000 loan from Tipton to Rackley on or about December 29, 1986;

(b) $90,000 loan from Tipton to SKL on or about December 30, 1986;

(c) $100,000 loan from Tipton to Hurley on or about December 30, 1986 (not booked);

(d) $100,000 loan from Tipton to SKL on or about December 30, 1986 (not booked);

(e) $90,000 loan from Hammon to Rackley on or about December 31, 1986 (only $40,000 was deposited in SKL's account at Century);

(f) $90,000 loan from Hammon to SKL on or about December 31, 1986;

(g) $60,000 loan from Hammon to Hurley on or about December 31, 1986 (proceeds were transferred back to Tipton, to partially reimburse the bank for the $100,000 loans to Hurley and SKL which were not booked;

(h) $100,000 loan from Blanchard to SKL on or about December 29, 1986.

(11) The loans set forth in paragraph (10) above were made on the basis of virtually no credit information or other documentation from the borrowers. Rackley was the loan officer for all of the nominee loans at Tipton and Hammon, except for the loans to himself. As directors, Rackley and Respondent approved the loans at Tipton and Hammon, although Rackley abstained from voting on his own notes.

(12) On or about December 30, 1986, Respondent delivered a $400,000 cashier's check from Macao, payable to Cypert. The check represented the proceeds of the nominee loans made at Tipton, Hammon and Blanchard set forth in paragraph (10) above. Cypert exchanged the cashier's check from Macao for his own $400,000 cashier's check payable to MBank and, on December 30, flew to Dallas with Respondent where they met with MBank officials. Cypert exchanged the $400,000 cashier's check for the Tipton and Hammon notes and underlying stock interest. Shortly thereafter, Cypert assigned his interest in the notes and stock to Macao and gave the assignment, notes and stock to Respondent.

(13) In February 1987, MBank agreed to sell the Willow and Granite notes, with an underlying interest in the bank stock, some additional corporate stock and a real estate mortgage held as collateral, to Cypert for $750,000. The deal was scheduled for closing on February 27, 1987 in Dallas.

(14) Between February 23 and 27, 1987, Tipton, Hammon, Blanchard and the First National Bank of Del City, Del City, Oklahoma (Del City) made a total of ten unsecured loans to various borrowers listed under subparagraphs (a)-(j) below. Except where noted, the proceeds of these loans, totaling $520,000, were deposited in SKL's account at Century and subsequently transferred by cashier's check to Macao. The amounts, granting banks, borrowers' names and dates of the nominee loans are as follows:

(a) $60,000 loan from Tipton to Tom Lucas on or about February 23, 1987;

(b) $93,000 loan from Tipton to Jack Marshall on or about February 24, 1987 (only $65,351 was deposited in SKL's account at Century; the remaining $27,649 was used to make a payment on one of Hudson's loans at the Peoples State Bank, Claremore, Oklahoma (Peoples));

(c) $30,000 loan from Tipton to David Tuck on or about February 25, 1987;

(d) $92,000 loan from Hammon to Jack Marshall on or about February 24, 1987 (only $64,649 was deposited in SKL's account at Century; the remaining $27,351 was used to make a payment on one of Hudson's loans at Peoples');

(e) $20,000 loan from Hammon to David Tuck on or about February 27, 1987;

(f) $10,000 loan from Hammon to Sharon Matthews on or about February 27, 1987;

(g) $40,000 loan from Blanchard to Tom Lucas on or about February 26, 1987;

(h) $60,000 loan from Blanchard to Rackley on or about February 26, 1987;

(i) $100,000 loan from Blanchard to Partridge Capital Corp., on or about February 26, 1987;

(j) $70,000 loan from Del City to SKL on or about February 25, 1987.

(15) In addition to the loans set forth in paragraph (14) above, Tipton made a $50,000 loan to H.H. Clifford on or about February 25, 1987. The proceeds of this loan were transferred to Executive Bank Management Services, Inc., a company controlled by Hudson. Hudson used the proceeds to purchase a $50,000 cashier's check payable to Macao.

(16) Tipton also made a $90,000 loan to Cypert on or about February 19, 1987, and Hammon made a $90,000 loan to Cypert on or about February 27, 1987.

(17) The loans set forth in paragraphs (14) through (16) above were made on the basis of virtually no credit information or other documentation from the borrowers. Rackley was the loan officer for all of the nominee loans at Tipton and Hammon, except for the $92,000 loan from

Hammon to Jack Marshall. As directors, Rackley and Respondent approved the loans at Tipton and Hammon, although Rackley abstained from voting on his own notes.

(18)On or about February 27, 1987, Respondent delivered a $570,000 cashier's check from Macao, payable to Cypert. The check represented the proceeds of the nominee loans made at Tipton, Hammon, Blanchard and Del City set forth in paragraphs (14) and (15) above. Cypert exchanged the $570,000 cashier's check and the proceeds of the two $90,000 loans from Tipton and Hammon for a $750,000 cashier's check payable to MBank. On February 27, 1987, Cypert and Respondent flew to Dallas where they again met with MBank officials. Cypert exchanged the $750,000 cashier's check for the Willow and Granite notes, underlying stock interests, and assignment of the real estate mortgage. At the request of Hudson and Respondent, Cypert reassigned the real estate mortgage to Blanchard where it was used to provide security for one of Hudson's loans.

(19) Hudson directly benefited from the nominee loans at Tipton and Hammon that were used to purchase his bank stock notes at MBank. Hudson also directly benefited from the portions of the Jack Marshall loans from Tipton and Hammon that were used to make a payment on one of his loans at Peoples. Those loans are therefore attributable to him for lending limit purposes pursuant to 12 C.F.R. § 32.5(a)(1). At Tipton, the $20,000 advance to Rackley on December 29, 1986, when combined with Hudson's existing advances, first caused the line to exceed the bank's legal lending limit set forth at 12 U.S.C. § 84(a)(1). Total advances attributable to Hudson equaled $533,020 at Tipton, which exceeded the lending limit by $437,509. At Hammon, the $60,000 advance to Hurley and the $90,000 advances to SKL and Rackley on December 31, 1986, when combined with Hudson's existing advances, first caused the line to exceed the bank's lending limit. Total advances attributable to Hudson

equaled $52,020 at Hammon, which exceeded the lending limit by $407,792.

(20) The nominee loans at Tipton and Hammon are also attributable to Hudson for purposes of 12 U.S.C. § 375b, and 12 C.F.R. §§ 31.2(b) and 215.4(b), pursuant to 12 U.S.C. §§ 31.3 and 215.3(f). At Tipton, the loans to Clifford, Cypert, Lucas, Marshall, SKL and Tuck were made at a time when Hudson's aggregate indebtedness exceeded five percent of capital and surplus, but did not receive prior board approval, in violation of 12 U.S.C. § 375b(2) and 12 C.F.R. §§ 31.2(b)(1) and 215.4(b)(1)(i). At Hammon, the loans to Cypert, Marshall, Matthews and Tuck were made at a time when Hudson's aggregate indebtedness exceeded five percent of capital and surplus, but did not receive prior board approval, in violation of 12 U.S.C. § 375b(2) and 12 C.F.R. §§ 31.2(b)(1) and 215.4(b)(1)(i).

(21) The violations set forth in paragraphs (19) and (20) above were uncorrected at the close of the May 31, 1987 examination of Tipton and the June 30, 1987 examination of Hammon. The violations resulted in losses of approximately $456,000 at Tipton and $437,000 at Hammon. The losses contributed to the banks' failures on specifically set forth in the Report of Supervisory Activity September 3, 1987. Further details of the violations are of Tipton dated May 31, 1987 Tipton ROSA and the Report of Supervisory Activity of Hammon dated June 30, 1987 (1987 Hammon ROSA). The 1987 Tipton ROSA and 1987 Hammon ROSA are incorporated herein by reference the same as if fully set forth.

ARTICLE III

(1) The actions of Respondent described in Article II, paragraphs (1) through (21) above demonstrate that Respondent has committed violations of law and unsafe and unsound practices at Tipton and Hammon which resulted in substantial financial loss or other damage to the banks

and serious prejudice to depositors' interests. The violations and practices involve personal dishonesty on Respondent's part and demonstrate a willful and continuing disregard for such banks' safety and soundness.

THEREFORE, Respondent is directed to file an answer in writing to the charges contained herein with the Hearing Clerk, Office of the Chief Counsel, Office of the Comptroller of the Currency, Washington, D.C. 20219, within twenty (20) days from the date of service of this Notice, in accordance with 12 C.F.R. Part 19.

Pursuant to 12 U.S.C. § 1818(h)(1) and 12 C.F.R. § 19.10(c), the Comptroller may, in his discretion, order that a public hearing be held if he determines that it is necessary to protect the public interest. Respondent is hereby afforded an opportunity to submit his views as to whether a public hearing would be in the public interest in this case.

WITNESS, my hand on behalf of the Office of the Comptroller of the Currency, given at Washington, D.C. the 31st day of August, 1989.

/s/ Dean S. Marriott
DEAN S. MARRIOTT
Senior Deputy Comptroller
for Bank Supervision

APPENDIX K

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF
THE CURRENCY

IN THE MATTER OF JACK B. RACKLEY
FIRST NATIONAL BANK OF TIPTON, TIPTON, OKLAHOMA
FIRST NATIONAL BANK OF HAMMON,
HAMMON, OKLAHOMA

NOTICE OF INTENTION TO PROHIBIT
FURTHER PARTICIPATION

To: Jack B. Rackley, formerly of the First National Bank of Tipton, Tipton, Oklahoma, and the First National Bank of Hammon, Hammon, Oklahoma

TAKE NOTCE, that on the 2nd day of October, 1989, a hearing will commence at 10:00 a.m. in the United States Courthouse for the Western District of Oklahoma, Oklahoma City, Oklahoma, pursuant to the Federal Deposit Insurance Act, as amended, 12 U.S.C. § 1818(e), (i) concerning the charges set forth herein to determine whether an Order should be issued against Jack B. Rackly (Respondent) prohibiting him from further participation, in any manner, in the conduct of the affairs of any insured depository institution.

After examination and investigation into the affairs of the First National Bank of Tipton, Tipton, Oklahoma (Tipton) and the First National Bank of Hammon, Hammon, Oklahoma (Hammon), the Comptroller of the Currency of the United States of America (Comptroller) is of the opinion that Respondent has committed violations of law and engaged in unsafe and unsound practices at such

banks which resulted in substantial financial loss or other damage and serious prejudice to the interests of the depositors. The Comptroller has further determined that the violations and practices involve personal dishonesty on Respondent's part and demonstrate a willful and continuing disregard for the banks' safety and soundness.

THEREFORE TAKE NOTICE of the Comptroller's intention to prohibit Respondent from further participation, in any manner, in the conduct of the affairs of any insured depository institution, pursuant to 12 U.S.C. § 1818(e), (i). In support of this Notice of Intention to Prohibit Further Participation (Notice), the Comptroller charges the following:

ARTICLE I

(1) Tipton and Hammon were national banking associations, chartered and examined by the Comptroller pursuant to the National Bank Act of 1864, as amended (12 U.S.C. § 1 *et seq.*).

(2) At all times relevant to the violations described below, Respondent was president and a director of Tipton, and a director of Hammon. In his capacity as an officer and director. Respondent was under a statutory and fiduciary duty to supervise the banks' affairs in accordance with all applicable laws, rules and regulations.

(3) Tipton and Hammon were declared insolvent by the Comptroller on September 3, 1987. The Comptroller has jurisdiction to issue this Notice under 12 U.S.C. § 1818(i)(3), which provides the Comptroller with authority to prohibit an individual who has become separated from a national banking association from participating in the affairs of any depository institution.

ARTICLE II

(1) In the early 1980's, John Hudson became the chairman of the board and controlling shareholder of

Tipton and Hammon, as well as the First State Bank, Blanchard, Oklahoma (Blanchard), the First State Bank, Granite, Oklahoma (Granite) and the First State Bank, Willow, Oklahoma (Willow), all of which have failed. In July 1983, Hudson borrowed approximately $8.4 million from MBank, Dallas, Texas (MBank) to refinance his ownership of these institutions. The notes were secured by the banks' stock, as well as other collateral.

(2) In 1984, Tipton's and Hammon's boards of directors, including Hudson, executed formal agreements with the OCC. The formal agreements addressed problems in the lending area and required the correction and preventions of law.

(3) On or about June 11, 1986, Tipton made a $25,010 loan to Hudson. On or about June 27, 1986, Tipton made a $75,010 loan to Hudson.

(4) On or about March 8, 1984, Hammon made a $25,000 loan to Hudson. On or about December 31, 1985, Hammon made a $75,020 loan to Hudson.

(5) The OCC's examinations of Tipton and Hammon in 1986 disclosed numerous insider violations involving Hudson, and areas of noncompliance with the formal agreements. The September 30, 1986 Report of Supervisory Activity of Tipton (1986 Tipton ROSA) cited the bank for violations of 12 U.S.C. §§ 375a and 375b, and 12 C.F.R. § 31.2. The September 30, 1986 Report of Supervisory Activity of Hammon (1986 Hammon ROSA) cited the bank for violations of 12 U.S.C. § 375a and 12 C.F.R. § 31.2. The details of these violations are specifically set forth in the 1986 Tipton ROSA and the 1986 Hammon ROSA, which are incorporated herein by reference the same as if fully set forth.

(6) In 1986, Hudson defaulted on his bank stock loans at MBank. On August 8, 1986, Hudson resigned as a director of Tipton. Hudson also resigned as a director of Hammon during the September 30, 1986 examination and

was replaced by Respondent. In October 1986, Respondent. In October 1986, Respondent became Tipton's president.

(7) In the fall of 1986, Hudson contacted Claud Cypert, an Oklahoma businessman, to solicit his interest in representing a group of investors known as Macao Investment Company (Macao) who were allegedly interested in purchasing Hudson's bank stock notes at MBank. Macao's corporate records indicate that Hudson is Macao's president and a major shareholder. Hudson did not disclose the name of the group or his involvement in it to Cypert. In exchange for an option to purchase a five percent interest in Tipton and Hammon, and a bus to be donated to the Southern Nazarene University, Cypert agreed to represent the group in its dealings with MBank.

(8) On or about December 1, 1986, Hudson and MBank entered into a settlement agreement whereby MBank was given the right to sell the bank stock securing Hudson's notes. The settlement agreement provided that after the sale of the bank stock, Hudson would be liable to MBank for any deficiency up to $2.75 million. The agreement further provided that Hudson would sell his interest in Blanchard to his father-in-law, Jack Marshall, and resign as a director of all the banks and their holding companies.

(9) In December 1986, MBank agreed to sell the Tipton and Hammon notes, with an underlying interest in the bank stock, to Cypert for $400,000. The deal was scheduled for closing on December 30, 1986 in Dallas.

(10) Between December 29 and 31, 1986, Tipton, Hammon and Blanchard made a total of eight unsecured loans to various nominee borrowers listed under subparagraphs (a)-(h) below. Except where noted, the proceeds of these loans, totaling $540,000, were deposited in an account of SKL, Inc. (SKL) at the Century National Bank, Oklahoma City, Oklahoma (Century). $400,000

of the proceeds were subsequently transferred by cashier's check to Macao. The remaining $140,000 was transferred back to Tipton, along with the proceeds of a $60,000 loan from Hammon to Hurley Financial Corporation (Hurley), to reimburse Tipton for $100,000 loans to Hurley and SKL which were not booked. The amounts, granting banks, borrowers' names and dates of the nominee loans are as follows:

(a) $20,000 loan from Tipton to Respondent on or about December 29, 1986;

(b) $90,000 loan from Tipton to SKL on or about December 30, 1986;

(c) $100,000 loan from Tipton to Hurley on or about December 30, 1986 (not booked);

(d) $100,000 loan from Tipton to SKL on or about December 30, 1986 (not booked);

(e) $90,000 loan from Hammon to Respondent on or about December 31, 1986 (only $40,000 was deposited in SKL's account at Century);

(f) $90,000 loan from Hammon to SKL on or about December 31, 1986;

(g) $60,000 loan from Hammon to Hurley on or about December 31, 1986 (proceeds were transferred back to Tipton, to partially reimburse the bank for the $100,000 loans to Hurley and SKL which were not booked);

(h) $100,000 loan from Blanchard to SKL on or about December 29, 1986.

(11) The loans set forth in paragraph (10) above were made on the basis of virtually no credit information or other documentation from the borrowers. Respondent was the loan officer for all of the nominee loans at Tipton and Hammon, except for the loans to himself. As directors,

Respondent and Larry Baresel approved the loans at Tipton and Hammon, although Respondent abstained from voting on his own notes.

(12) On or about December 30, 1986, Baresel delivered a $400,000 cashier's check from Macao, payable to Cypert. The check represented the proceeds of the nominee loans made at Tipton, Hammon and Blanchard set forth in paragraph (10) above. Cypert exchanged the cashier's check from Macao for his own $400,000 cashier's check payable to MBank and, on December 30, flew to Dallas with Baresel where they met with MBank officials. Cypert exchanged the $400,000 cashier's check for the Tipton and Hammon notes and underlying stock interest. Shortly thereafter, Cypert assigned his interest in the notes and stock to Macao and gave the assignment, notes and stock to Baresel.

(13) In February 1987, MBank agreed to sell the Willow and Granite notes, with an underlying interest in the bank stock, some additional corporate stock and a real estate mortgage held as collateral, to Cypert for $750,000. The deal was scheduled for closing on February 27, 1987 in Dallas.

(14) Between February 23 and 27, 1987, Tipton, Hammon, Blanchard and the First National Bank of Del City, Del City, Oklahoma (Del City) made a total of ten unsecured loans to various borrowers listed under subparagraphs (a)-(j) below. Except where noted, the proceeds of these loans, totaling $520,000, were deposited in SKL's account at Century and subsequently transferred by cashier's check to Macao. The amounts, granting banks, borrowers' names and dates of the nominee loans are as follows:

(a) $60,000 loan from Tipton to Tom Lucas on or about February 23, 1987;

(b) $93,000 loan from Tipton to Jack Marshall on or about February 24, 1987 (only $65,351 was

deposited in SKL's account at Century; the remaining $27,649 was used to make a payment on one of Hudson's loans at the Peoples State Bank, Claremore, Oklahoma (Peoples));

(c) $30,000 loan from Tipton to David Tuck on or about February 25, 1987;

(d) $92,000 loan from Hammon to Jack Marshall on or about February 24, 1987 (only $64,649 was deposited in SKL's account at Century; the remaining $27,351 wasu sed to make a payment on one of Hudson's loans at Peoples);

(e) $20,000 loan from Hammon to David Tuck on or about February 27, 1987;

(f) $10,000 loan from Hammon to Sharon Matthews on or about February 27, 1987;

(g) $40,000 loan from Blanchard to Tom Lucas on or about February 26, 1987;

(h) $60,000 loan from Blanchard to Respondent on or about February 26, 1987;

(i) $100,000 loan from Blanchard to Partridge Capital Corp., on or about February 26, 1987;

(j) $70,000 loan from Del City to SKL on or about February 25, 1987.

(15) In addition to the loans set forth in paragraph (14) above, Tipton made a $50,000 loan to H.H. Clifford on or about February 25, 1987. The proceeds of this loan were transferred to Executive Bank Management Services, Inc., a company controlled by Hudson. Hudson used the proceeds to purchase a $50,000 cashier's check payable to Macao.

(16) Tipton also made a $90,000 loan to Cypert on or about February 19, 1987, and Hammon made a $90,000 loan to Cypert on or about February 27, 1987.

(17) The loans set forth in paragraphs (14) through (16) above were made on the basis of virtually no credit information or other documentation from the borrowers. Respondent was the loan officer for all of the nominee loans at Tipton and Hammon, except for the $92,000 loan from Hammon to Jack Marshall. As directors, Respondent and Baresel approved the loans at Tipton and Hammon, although Respondent abstained from voting on his own notes.

(18) On or about February 27, 1987, Baresel delivered a $570,000 cashier's check from Macao, payable to Cypert. The check represented the proceeds of the nominee loans made at Tipton, Hammon, Blanchard and Del City set forth in paragraphs (14) and (15) above. Cypert exchanged the $570,000 cashier's check and the proceeds of the two $90,000 loans from Tipton and Hammon for a $750,000 cashier's check payable to MBank. On February 27, 1987, Cypert and Baresel flew to Dallas where they again met with MBank officials. Cypert exchanged the $750,000 cashier's check for the Willow and Granite notes, underlying stock interests, and assignment of the real estate mortgage. At the request of Hudson and Baresel, Cypert reassigned the real estate mortgage to Blanchard where it was used to provide security for one of Hudson's loans.

(19) Hudson directly benefited from the nominee loans at Tipton and Hammon that were used to purchase his bank stock notes at MBank. Hudson also directly benefited from the portions of the Jack Marshall loans from Tipton and Hammon that were used to make a payment on one of his loans at Peoples. Those loans are therefore attributable to him for lending limit purposes pursuant to 12 C.F.R. § 32.5(a)(1). At Tipton, the $20,000 advance to Respondent on December 29, 1986, when combined with Hudson's existing advances, first caused the line to exceed the bank's legal lending limit set forth at 12 U.S.C. § 84(a)(1). Total advances attributable to Hudson

equaled $533,020 at Tipton, which exceeded the lending limit by $437,509. At Hammon, the $60,000 advance to Hurley and the $90,000 advances to SKL and Respondent on December 31, 1986, when combined with Hudson's existing advances, first caused the line to exceed the bank's lending limit. Total advances attributable to Hudson equaled $502,020 at Hammon, which exceeded the lending limit by $407,792.

(20) The nominee loans at Tipton and Hammon are also attributable to Hudson for purposes of 12 U.S.C. § 375b, and 12 C.F.R. §§ 31.2(b) and 215.4(b), pursuant to 12 U.S.C. §§ 31.3 and 215.3(f). At Tipton, the loans to Clifford, Cypert, Lucas, Marshall, SKL and Tuck were made at a time when Hudson's aggregate indebtedness exceeded five percent of capital and surplus, but did not receive prior board approval, in violation of 12 U.S.C. § 375b(2) and 12 C.F.R. §§ 31.2(b)(1) and 215.4(b)(1)(i). At Hammon, the loans to Cypert, Marshall, Matthews and Tuck were made at a time when Hudson's aggregate indebtedness exceeded five percent of capital and surplus, but did not receive prior board approval, in violation of 12 U.S.C. § 375b(2) and 12 C.F.R. §§ 31.2(b)(1) and 215.4(b)(1)(i).

(21) The violations set forth in paragraphs (19) and (20) above were uncorrected at the close of the May 31, 1987 examination of Tipton and the June 30, 1987 examination of Hammon. The violations resulted in losses of approximately $456,000 at Tipton and $437,000 at Hammon. The losses contributed to the banks' failures on September 3, 1987. Further details of the violations are specifically set forth in the Report of Supervisory Activity of Tipton dated May 31, 1987 (1987 Tipton ROSA) and the Report of Supervisory Activity of Hammon dated June 30, 1987 (1987 Hammon ROSA). The 1987 Tipton ROSA and 1987 Hammon ROSA are incorporated herein by reference the same as if fully set forth.

ARTICLE III

(1) The actions of Respondent described in Article II, paragraphs (1) through (21) above demonstrate that Respondent has committed violations of law and engaged in unsafe and unsound practices at Tipton and Hammon which resulted in substantial financial loss or other damage to the banks and serious prejudice to depositors' interests. The violations and practices involve personal dishonesty on Respondent's part and demonstrate a willful and continuing disregard for such banks' safety and soundness.

THEREFORE, Respondent is directed to file an answer in writing to the charges contained herein with the Hearing Clerk, Office of the Chief Counsel, Office of the Comptroller of the Currency, Washington, D.C. 20219, within twenty (20) days from the date of service of this Notice, in accordance with 12 C.F.R. Part 19.

Pursuant to 12 U.S.C. § 1818(h)(1) and 12 C.F.R. § 19.10(c), the Comptroller may, in his discretion, order that a public hearing be held if he determines that it is necessary to protect the public interest. Respondent is hereby afforded an opportunity to submit his views as to whether a public hearing would be in the public interest in this case.

WITNESS, my hand on behalf of the Office of the Comptroller of the Currency, given at Washington, D.C. the 31st day of August, 1989.

/s/ Dean S. Marriott
DEAN S. MARRIOTT
Senior Deputy Comptroller
for Bank Supervision

APPENDIX L

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER
OF THE CURRENCY

AA-EC-89-05
AA-EC-89-117

IN THE MATTER OF JOHN HUDSON
FIRST NATIONAL BANK OF TIPTON (INSOLVENT)
TIPTON, OKLAHOMA
FIRST NATIONAL BANK OF HAMMON (INSOLVENT)
HAMMON, OKLAHOMA

STIPULATION AND CONSENT ORDER

WHEREAS, the Comptroller of the Currency of the United States of America (Comptroller) has initiated civil money penalty proceedings against John Hudson (Respondent) pursuant to 12 U.S.C. §§ 93(b), 504(c) through the issuance of a Notice of Assessment of a Civil Money Penalty (Notice), dated February 13, 1989; and

WHEREAS, the Comptroller has initiated prohibition proceedings against Respondent pursuant to 12 U.S.C. § 1818(e) (as amended) through the issuance of a Notice of Intention to Prohibit Further Participation (Prohibition Notice), dated August 31, 1989; and

WHEREAS, in the interest of cooperation and the avoidance of further proceedings with respect to the above matters, the Comptroller and Respondent wish to enter into this Stipulation and Consent Order;

NOW, THEREFORE, in consideration of the above premises, it is stipulated by and between the Comptroller,

through his duly authorized representative, and Respondent that:

ARTICLE I

(1) Respondent hereby consents to a civil money penalty the amount of sixteen thousand five hundred dollars ($16,500). Said penalty shall be payable in five installments, as follows: two thousand five hundred dollars ($2,500) upon Respondent's execution of this document, three thousand five hundred dollars ($3,500) within one year of Respondent's execution of this document, three thousand five hundred dollars ($3,500) within two years of Respondent's execution of this document, three thousand five hundred dollars ($3,500) within three years of Respondent's execution of this document, and three thousand five hundred dollars ($3,500) within four years of Respondent's execution of this document. Said penalty shall be payable to the Treasury of the United States and shall be delivered to the Hearing Clerk, Office of the Chief Counsel, Office of the Comptroller of the Currency, Washington, D.C. 20219.

(2) In the event Respondent fails to make any payment within the periods stated in paragraph (1) above, Respondent will be given written notice that such payment is lacking. Respondent will then have ten days from his receipt of such written notice in which to tender payment. If payment is not tendered within that ten-day period, the entire unpaid balance of said penalty shall become due and payable immediately.

(3) This Article of this Stipulation and Consent Order shall be enforceable to the same extent and in the same manner as an effective and outstanding order that has been issued and has become final pursuant to 12 U.S.C. §§ 93, 504, 1818(i) (as amended).

ARTICLE II

(1) With respect to the institutions and agencies set forth in paragraph (2) of this Article, Respondent hereby agrees that he shall not:

(a) participate in any manner in the conduct of their affairs;

(b) solicit, procure, transfer, attempt to transfer, vote, or attempt to vote any proxy, consent, or authorization with respect to any voting rights;

(c) vote for a director, or serve or act as an "institution-affiliated party," as defined in 12 U.S.C. § 1813(u) (as amended); or

(d) violate any voting agreement previously approved by the "appropriate Federal banking agency," as defined in 12 U.S.C. § 1813(q) (as amended);

(2) The prohibitions in paragraph (1) of this Article apply to the following institutions and agencies:

(a) any insured depository institution, as defined in 12 U.S.C. § 1813(C);

(b) any institution treated as an insured bank under 12 U.S.C. § 1818(b)(3), (b)(4), or as a savings association under 12 U.S.C. § 1818(b)(8) (as amended);

(c) any insured credit union under the Federal Credit Union Act;

(d) any institution chartered under the Farm Credit Act of 1971;

(e) any appropriate Federal depository institution regulatory agency;

(f) the Federal Housing Finance Board and any Federal home loan bank;

(g) the Resolution Trust Corporaiton.

(3) The prohibitions of paragraphs (1) and (2) of this Article shall cease to apply with respect to a particular institution if Respondent obtains the prior written consent of both the Comptroller and the institution's "appropriate

Federal financial institutions regulatory agency," as defined in 12 U.S.C. § 1818(e)(7)(D) (as amended).

(4) This Article of this Stipulation and Consent Order shall be enforceable to the same extent and in the same manner as an effective and outstanding order that has been issued and has become final pursuant to 12 U.S.C. § 1818(e), (i), (j), and (k) (as amended).

ARTICLE III

(1) Respondent hereby waives:

(a) all rights to a hearing and a final agency decision pursuant to 12 U.S.C. §§ 93, 504, 1818 and 12 C.F.R. Part 19;

(b) all rights to seek judicial review of this Order;

(c) all rights in any way to contest the validity of this Order; and

(d) any and all claims for fees or expenses related to this Order against the Comptroller, or any of his agents, whether arising under common law or under the terms of any statute, including, but not limited to, the Equal access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412.

ARTICLE IV

(1) The Comptroller hereby agrees that this Stipulation and Consent Order does not constitute an admission of Respondent to any of the charges contained in either the Notice or the Prohibition Notice, nor shall any court of law construe it to constitute any such admission, nor shall any court of law use it as evidence of any such admission.

ARTICLE V

(1) The Comptroller hereby agrees that the execution of this Stipulation and Consent Order settles all claims the Comptroller may have against Respondent for violations

alleged in the Notice, Prohibition Notice, or any Report of Examination of the First National Bank of Tipton or the First National Bank of Hammon. The Comptroller also hereby agrees not to institute any additional enforcement actions against Respondent for the violations alleged in the Notice, Prohibition Notice, or any Report of Examination of the First National Bank of Tipton or the First National Bank of Hammon. Respondent understands that nothing herein shall preclude any proceedings brought by the Comptroller to enforce the terms of this Stipulation and Consent, and that nothing herein constitutes, nor shall Respondent contend that it constitutes, a waiver of any right, power, or authority of any other representatives of the United States, or agencies thereof, to bring other actions deemed appropriate.

IN TESTIMONY WHEREOF, the undersigned have hereunto set their hands.

Date 11-27-89 /s/ Robert J. Hermann
ROBERT J. HERMANN
Senior Deputy Comptroller
for Bank Supervision

Date 10-26-89 /s/ John Hudson
JOHN HUDSON

APPENDIX M

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER
OF THE CURRENCY

AA-EC-89-05
AA-EC-89-118

IN THE MATTER OF JACK RACKLEY
FIRST NATIONAL BANK OF TIPTON (INSOLVENT)
TIPTON, OKLAHOMA
FIRST NATIONAL BANK OF HAMMON (INSOLVENT)
HAMMON, OKLAHOMA

STIPULATION AND CONSENT ORDER

WHEREAS, the Comptroller of the Currency of the United States of America (Comptroller) has initiated civil money penalty proceedings against Jack Rackley (Respondent) pursuant to 12 U.S.C. §§ 93(b), 504(c) through the issuance of a Notice of Assessment of a Civil Money Penalty (Notice of Assessment), dated February 13, 1989; and

WHEREAS, the Comptroller has initiated prohibition proceedings against Respondent pursuant to 12 U.S.C. § 1818(e) (as amended) through the issuance of a Notice of Intention to Prohibit Further Participation (Prohibition Notice), dated August 31, 1989; and

WHEREAS, in the interest of cooperation and the avoidance of further proceedings with respect to the above matters, the Comptroller and Respondent wish to enter into this Stipulation and Consent Order;

NOW, THEREFORE, in consideration of the above premises, it is stipulated by and between the Comptroller, through his duly authorized representative, and Respondent that:

ARTICLE I

(1) Respondent hereby consents to a civil money penalty in the amount of twelve thousand five hundred dollars ($12,500). Said penalty shall be payable in four installments, as follows: two thousand five hundred dollars ($2,500) upon Respondent's execution of this document, three thousand three hundred thirty-three dollars ($3,333) within one year of Respondent's execution of this document, three thousand three hundred thirty-three dollars ($3,333) within two years of Respondent's execution of this document, and three thousand three hundred thirty-three ($3,333) within three years of Respondent's execution of this document. Said penalty shall be payable to the Treasury of the United States and shall be delivered to the Hearing Clerk, Office of the Chief Counsel, Office of the Comptroller of the Currency, Washington, D.C. 20219.

(2) In the event Respondent fails to make any payment within the periods stated in paragraph (1) above, Respondent will be given written notice that such payment is lacking. Respondent will then have ten days from receipt of such written notice in which to tender payment. If payment is not tendered within that ten-day period, the entire unpaid balance of said penalty shall become due and payable immediately.

(3) This Article of this Stipulation and Consent Order shall be enforceable to the same extent and in the same manner as an effective and outstanding order that has been issued and has become final pursuant to 12 U.S.C. §§ 93, 504, 1818(i) (as amended).

ARTICLE II

(1) With respect to the institutions and agencies set forth in paragraph (2) of this Article, Respondent hereby agrees that he shall not:

(a) participate in any manner in the conduct of their affairs;

(b) solicit, procure, transfer, attempt to transfer, vote, or attempt to vote any proxy, consent, or authorization with respect to any voting rights;

(c) vote for a director, or serve or act as an "institution-affiliated party," as defined in 12 U.S.C. § 1813(u) (as amended); or

(d) violate any voting agreement previously approved by the "appropriate Federal banking agency," as defined in 12 U.S.C. § 1813(q) (as amended);

(2) The prohibitions in paragraph (1) of this Article apply to the following institutions and agencies:

(a) any insured depository institution, as defined in 12 U.S.C. § 1813(C);

(b) any institution treated as an insured bank under 12 U.S.C. § 1818(b)(3), (b)(4), or as a savings association under 12 U.S.C. § 1818(b)(8) (as amended);

(c) any insured credit union under the Federal Credit Union Act;

(d) any institution chartered under the Farm Credit Act of 1971;

(e) any appropriate Federal depository institution regulatory agency;

(f) the Federal Housing Finance Board and any Federal home loan bank; and

(g) the Resolution Trust Corporation.

(3) The prohibitions of paragraphs (1) and (2) of this Article shall cease to apply with respect to a particular institution if Respondent obtains the prior written consent of both the Comptroller and the institution's "appropriate Federal financial institutions regulatory agency," as defined in 12 U.S.C. § 1818(e)(7)(D) (as amended).

(4) This Article of this Stipulation and Consent Order shall be enforceable to the same extent and in the same manner as an effective and outstanding order that has been issued and has become final pursuant to 12 U.S.C. § 1818(e), (i), (j), and (k) (as amended).

ARTICLE III

(1) Respondent hereby waives:

(a) all rights to a hearing and a final agency decision pursuant to 12 U.S.C. §§ 93, 504, 1818 and 12 C.F.R. Part 19;

(b) all rights to seek judicial review of this Order;

(c) all rights in any way to contest the validity of this Order; and

(d) any and all claims for fees or expenses related to this Order against the Comptroller, or any of his agents, whether arising under common law or under the terms of any statute, including, but not limited to, the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412.

ARTICLE IV

(1) The Comptroller hereby agrees that the execution of this Stipulation and Consent Order settles all claims the Comptroller may have against Respondent for violations alleged in the Notice of Assessment and Prohibition Notice, and further agrees not to institute any additional enforcement actions against Respondent for the violations alleged in the Notice of Assessment and the Prohibition

Notice. Respondent understands that nothing herein shall preclude any proceedings brought by the Comptroller to enforce the terms of this Stipulation and Consent, and that nothing herein constitutes, nor shall Respondent contend that it constitutes, a waiver of any right, power, or authority of any other representatives of the United States, or agencies thereof, to bring other actions deemed appropriate.

IN TESTIMONY WHEREOF, the undersigned have hereunto set their hands.

/s/ Robert J. Herrman 11-27-89
ROBERT J. HERRMAN
Senior Deputy Comptroller
for Bank Supervision

/s/ Jack Rackley Oct. 25, 1989
JACK RACKLEY

APPENDIX N

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER
OF THE CURRENCY

AA-EC-89-05
AA-EC-89-116

IN THE MATTER OF LARRY BARESEL
FIRST NATIONAL BANK OF TIPTON (INSOLVENT)
TIPTON, OKLAHOMA
FIRST NATIONAL BANK OF HAMMON (INSOLVENT)
HAMMON, OKLAHOMA

STIPULATION AND CONSENT ORDER

WHEREAS, the Comptroller of the Currency of the United States of America (Comptroller) has initiated civil money penalty proceedings against Larry Baresel (Respondent) pursuant to 12 U.S.C. §§ 93(b), 504(c) through the issuance of a Notice of Assessment of a Civil Money Penalty (Notice of Assessment), dated February 13, 1989; and

WHEREAS, the Comptroller has initiated prohibition proceedings against Respondent pursuant to 12 U.S.C. § 1818(e) (as amended) through the issuance of a Notice of Intention to Prohibit Further Participation (Prohibition Notice), dated August 31, 1989; and

WHEREAS, in the interest of cooperation and the avoidance of further proceedings with respect to the above matters, the Comptroller and Respondent wish to enter into this Stipulation and Consent Order;

NOW, THEREFORE, in consideration of the above premises, it is stipulated by and between the Comptroller, through his duly authorized representative, and Respondent that:

ARTICLE I

(1) Respondent hereby consents to a civil money penalty in the amount of fifteen thousand dollars ($15,000). Said penalty shall be payable in four equal installments, as follows: three thousand seven hundred fifty dollars ($3,750) upon Respondent's execution of this document, three thousand seven hundred fifty dollars ($3,750) within one year of Respondent's execution of this document, three thousand seven hundred fifty dollars ($3,750) within two years of Respondent's execution of this document, and three thousand seven hundred fifty dollars ($3,750) within three years of Respondent's execution of this document. Said penalty shall be payable to the Treasury of the United States and shall be delivered to the Hearing Clerk, Office of the Chief Counsel, Office of the Comptroller of the Currency, Washington, D.C. 20219.

(2) In the event Respondent fails to make any payment within the periods stated in paragraph (1) above, Respondent will be given written notice that such payment is lacking. Respondent will then have ten days from receipt of such written notice in which to tender payment. If payment is not tendered within that ten-day period, the entire unpaid balance of said penalty shall become due and payable immediately.

(3) This Article of this Stipulation and Consent Order shall be enforceable to the same extent and in the same manner as an effective and outstanding order that has been issued and has become final pursuant to 12 U.S.C. §§ 93, 504, 1818(i) (as amended).

ARTICLE II

(1) With respect to the institutions and agencies set forth in paragraph (2) of this Article, Respondent hereby agrees that he shall not:

(a) participate in any manner in the conduct of their affairs;

(b) solicit, procure, transfer, attempt to transfer, vote, or attempt to vote any proxy, consent, or authorization wtih respect to any voting rights;

(c) vote for a director, or serve or act as an "institution-affiliated party," as defined in 12 U.S.C. § 1813(u) (as amended); or

(d) violate any voting agreement previously approved by the "appropriate Federal banking agency," as defined in 12 U.S.C. § 1813(q) (as amended);

(2) The prohibitions in paragraph (1) of this Article apply to the following institutions and agencies:

(a) any insured depository institution, as defined in 12 U.S.C. § 1813(C);

(b) any institution treated as an insured bank under 12 U.S.C. § 1818(b)(3), (b)(4), or as a savings association under 12 U.S.C. § 1818(b)(8) (as amended);

(c) any insured credit union under the Federal Credit Union Act;

(d) any institution chartered under the Farm Credit Act of 1971;

(e) any appropriate Federal depository institution regulatory agency;

(f) the Federal Housing Finance Board and any Federal home loan bank; and

(g) the Resolution Trust Corporation.

(3) The prohibitions of paragraphs (1) and (2) of this Article shall cease to apply with respect to a particular institution if Respondent obtains the prior written consent of both the Comptroller and the institution's "appropriate Federal financial institutions regulatory agency," as defined in 12 U.S.C. § 1818(e)(7)(D) (as amended).

(4) This Article of this Stipulation and Consent Order shall be enforceable to the same extent and in the same manner as an effective and outstanding order that has been issued and has become final pursuant to 12 U.S.C. § 1818(e), (i), (j), and (k) (as amended).

ARTICLE III

(1) Respondent hereby waives:

(a) all rights to a hearing and a final agency decision pursuant to 12 U.S.C. §§ 93, 504, 1818 and 12 C.F.R. Part 19;

(b) all rights to seek judicial review of this Order;

(c) all rights in any way to contest the validity of this Order; and

(d) any and all claims for fees or expenses related to this Order against the Comptroller, or any of his agents, whether arising under common law or under the terms of any statute, including, but not limited to, the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412.

ARTICLE IV

(1) The Comptroller hereby agrees that this Stipulation and Consent Order does not constitute an admission of Respondent to any of the charges contained in either the Notice of Assessment or the Prohibition Notice, nor shall any court of law construe it to constitute any such admission, nor shall any court of law use it as evidence of any such admission.

ARTICLE V

(1) The Comptroller hereby agrees that the execution of this Stipulation and Consent Order settles all claims the Comptroller may have against Respondent for violations alleged in the Notice of Assessment and Prohibition Notice, and further agrees not to institute any additional enforcement actions against Respondent for the violations alleged in the Notice of Assessment and the Prohibition Notice. Respondent understands that nothing herein shall preclude any proceedings brought by the Comptroller to enforce the terms of this Stipulation and Consent, and that nothing herein constitutes, nor shall Respondent contend that it constitutes, a waiver of any right, power, or authority of any other representatives of the United States, or agencies thereof, to bring other actions deemed appropriate.

IN TESTIMONY WHEREOF, the undersigned have hereunto set their hands.

/s/ Robert J. Herrmann — Date 11-27-89
ROBERT J. HERMANN
Senior Deputy Comptroller
for Bank Supervision

/s/ Larry Baresel — Date 10/29/89
LARRY BARESEL

APPENDIX O

RELEVANT PROVISIONS OF THE UNITED STATES CODE

§ 93. Violations of provisions of chapter; forfeiture of franchise; personal liability of directors; civil money penalty

(a) If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this chapter, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper district or Territorial court of the United States in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.

(b)(1) Any national banking association which violates, or any officer, director, employee, agent, or other person participating in the conduct of the affairs of such association who violates any of the provisions of this chapter, or any of the provisions of section 92a of this title, or any regulation issued pursuant thereto, shall forfeit and pay a civil money penalty of not more than $1,000 per day for each day during which such violation continues. The penalty may be assessed and collected by the Comptroller of the Currency by written notice. As used in the section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

(2) In determining the amount of the penalty the Comptroller shall take into account the appropriateness of the penalty with respect to the size of financial resources and good faith of the association or person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require.

(3) The association or person assessed shall be afforded an opportunity for agency hearing, upon request made within ten days after issuance of the notice of assessment. In such hearing all issues shall be determined on the record pursuant to section 554 of Title 5. The agency determination shall be made by final order which may be reviewed only as provided in paragraph (4). If no hearing is requested as herein provided, the assessment shall constitute a final and unappealable order.

(4) Any association or person against whom an order imposing a civil money penalty has been entered after agency hearing under this section may obtain review by the United States court of appeals for the circuit in which the home office of the bank is located, or in the United States Court of Appeals for the District of Columbia Circuit, by filing a notice of appeal in such court within thirty days from the date of such order, and simultaneously sending a copy of such notice by registered or certified mail to the Comptroller. The Comptroller shall promptly certify and file in such court the record upon which the penalty was imposed, as provided in section 2112 of Title 28. The findings of the Comptroller shall be set aside if found to be unsupported by substantial evidence as provided by section 706(2)(e) of Title 5.

(5) If any association or person fails to pay an assessment after it has become a final and unappealable order, or after the court of appeals has entered final judgment in favor of the agency, the Comptroller shall refer the matter to the Attorney General, who shall recover the amount assessed by action in the appropriate United

States district court. In such action the validity and appropriateness of the final order imposing the penalty shall not be subject to review.

(6) The Comptroller may, in his discretion, compromise, modify, or remit any civil money penalty which is subject to imposition or has been imposed under this section.

(7) The Comptroller shall promulgate regulations establishing procedures necessary to implement this subsection.

(8) All penalties collected under authority of this section shall be covered into the Treasury of the United States.

(R.S. § 5239; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Nov. 10, 1978, Pub. L. 95-630, Title I, § 103, 92 Stat. 3643; Oct. 15, 1982, Pub. L. 97-320, Title IV, § 424 (d)(3), (f), 96 Stat. 1523; Oct. 15, 1982, Pub. L. 97-320, Title IV, § 424(g), as amended Jan. 12, 1983, Pub. L. 97-457, § 24, 96 Stat. 2510.)

§ 375. Purchases from directors; sales to directors

Any member bank may contract for, or purchase from, any of its directors or from any firm of which any of its directors is a member, any securities or other property, when (and not otherwise) such purchase is made in the regular course of business upon terms not less favorable to the bank than those offered to others, or when such purchase is authorized by a majority of the board of directors not interested in the sale of such securities or property, such authority to be evidenced by the affirmative vote or written assent of such directors: *Provided, however*, That when any director, or firm of which any director is a member, acting for or on behalf of others, sells securities or other property to a member bank, the Board of Governors of the Federal Reserve System by regulation may, in any or all cases, require a full disclosure to be

made, on forms to be prescribed by it, of all commissions or other considerations received, and whenever such director or firm, acting in his or its own behalf, sells securities or other property to the bank the Board of Governors of the Federal Reserve System, by regulation, may require a full disclosure of all profit realized from such sale.

Any member bank may sell securities or other property to any of its directors, or to a firm of which any of its directors is a member, in the regular course of business on terms not more favorable to such director or firm than those offered to others, or when such sale is authorized by a majority of the board of directors of a member bank to be evidenced by their affirmative vote or written assent: *Provided, however*, That nothing in this section contained shall be construed as authorizing member banks to purchase or sell securities or other property which such banks are not otherwise authorized by law to purchase or sell.

(Dec. 23, 1913, c. 6, § 22(d), as added Sept. 26, 1918, c. 177, § 5, 40 Stat. 970, and amended Aug. 23, 1935, c. 614, § 203(a), 49 Stat. 704.)

§ 375a. Loans to executive officers of banks

(1) General prohibition; authorization for extension of credit; conditions for credit

Except as authorized under this section, no member bank may extend credit in any manner to any of its own executive officers. No executive officer of any member bank may become indebted to that member bank except by means of an extension of credit which the bank is authorized to make under this section. Any extension of credit under this section shall be promptly reported to the board of directors of the bank, and may be made only if—

(A) the bank would be authorized to make it to borrowers other than its officers;

(B) it is on terms not more favorable than those afforded other borrowers;

(C) the officer has submitted a detailed current financial statement; and

(D) it is on condition that it shall become due and payable on demand of the bank at any time when the officer is indebted to any other bank or banks on account of extensions of credit of any one of the three categories respectively referred to in paragraphs (2), (3), and (4) in an aggregate amount greater than the amount of credit of the same category that could be extended to him by the bank of which he is an officer.

* * * *

§ 503. Liability of directors and officers of member banks

If the directors or officers of any member bank shall knowingly violate or permit any of the agents, officers, or directors of any member bank to violate any of the provisions of sections 375, 375a, 375b, and 376 of this title or regulations of the board made under authority thereof, or any of the provisions of sections 212, 213, 214, 215, 655, 1005, 1014, 1906, or 1909 of Title 18, every director and officer participating in or assenting to such violation shall be held liable in his personal and individual capacity for all damages which the member bank, its shareholders, or any other persons shall have sustained in consequence of such violation.

(Dec. 23, 1913, c. 6, § 22(f), as added Sept. 26, 1918, c. 177, § 5, 40 Stat. 970, and amended Sept. 3, 1954, c. 1263, § 28, 68 Stat.1236.)

§ 504. Civil penalty

(a) Making loans, extensions of credit, purchases of securities, etc., respecting affiliates, executive officers, etc.

Any member bank which violates or any officer, director, employee, agent, or other person participating in the

conduct of the affairs of such member bank who violates any provision of section 371c, 375, 375a, 375b, 376, and 503 of this title, or any regulation issued pursuant thereto, shall forfeit and pay a civil penalty of not more than $1,000 per day for each day during which such violation continues: *Provided*, That the agency having authority to impose a civil money penalty may, in its discretion, compromise, modify, or remit any civil money penalty which is subject to imposition or has been imposed under such authority. The penalty may be assessed and collected by the Comptroller of the Currency in the case of a national bank, or the Board in the case of a State member bank, by written notice. As used in this section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

* * * *

§ 1818. Termination of status as insured depository institution

(a) Termination of insurance

(1) Voluntary termination

Any insured depository institution which is not—

(A) a national member bank;

(B) a State member bank;

(C) a Federal branch;

(D) a Federal savings association; or

(E) an insured branch which is required to be insured under subsection (a) or (b) of section 3104 of this title,

may terminate such depository institution's status as an insured depository institution if such insured institution provides written notice to the Corporation

of the institution's intent to terminate such status not less than 90 days before the effective date of such termination.

(2) Involuntary termination

(A) Notice to primary regulator

If the Board of Directors determines that—

(i) an insured depository institution or the directors or trustees of an insured depository institution have engaged or are engaging in unsafe or unsound practices in conducting the business of the depository institution;

(ii) an insured depository institution is in an unsafe or unsound condition to continue operations as an insured institution; or

(iii) an insured depository institution or the directors or trustees of the insured institution have violated any applicable law, regulation, order, condition imposed in writing by the Corporation in connection with the approval of any application or other request by the insured depository institution, or written agreement entered into between the insured depository institution and the Corporation.

the Board of Directors shall notify the appropriate Federal banking agency with respect to such institution (if other than the Corporation) or the State banking supervisor of such institution (if the Corporation is the appropriate Federal banking agency) of the Board's determination and the facts and circumstances on which such determination is based for the purpose of securing the correction of such practice, condi-

tion, or violation. Such notice shall be given to the appropriate Federal banking ageny not less than 30 days before the notice required by subparagraph (B), except that this period for notice to the appropriate Federal banking agency may be reduced or eliminated with the agreement of such agency.

(B) Notice of intention to terminate insurance

If, after giving the notice required under subparagraph (A) with respect to an insured depository institution, the Board of Directors determines that any unsafe or unsound practice or condition or any violation specified in such notice requires the termination of the insured status of the insured depository institution, the Board shall—

(i) serve written notice to the insured depository institution of the Board's intention to terminate the insured status of the institution;

(ii) provide the insured depository institution with a statement of the charges on the basis of which the determination to terminate such instiution's insured status was made (or a copy of the notice under subparagraph (A)); and

(iii) notify the insured depository institution of the date (not less than 30 days after notice under this subpargraph) and place for a hearing before the Board of Directors (or any person designated by the Board) with respect to the termination of the institution's insured status.

(3) Hearing; termination

If, on the basis of the evidence presented at a hearing before the Board of Directors (or any person designated by the Board for such purpose), in

which all issues be determined on the record pursuant to section 554 of Title 5 and the written findings of the Board of Directors (or such person) with respect to such evidence (which shall be conclusive), the Board of Directors finds that any unsafe or unsound practice or condition or any violation specified in the notice to an insured depository institution under subparagraph (B) has been established, the Board of Directors may issue an order terminating the insured status of such depository institution effective as of a date subsequent to such finding.

(4) Appearance; consent to termination

Unless the depository institution shall appear at the hearing by a duly authorized representative, it shall be deemed to have consented to the termination of its status as an insured depository institution and termination of such status thereupon may be ordered.

(5) Judicial review

Any insured depository institution whose insured status has been terminated by order of the Board of Directors under this subsection shall have the right of judicial review of such order only to the same extent as provided for the review of orders under subsection (h) of this section.

(6) Publication of notice of termination

The Corporation may publish notice of such termination and the depository institution shall give notice of such termination to each of its depositors at his last address of record on the books of the depository institution, in such manner and at such time as the Board of Directors may find to be necessary and may order for the protection of depositors.

(7) Temporary insurance of deposits insured as of termination

After the termination of the insured status of any depository institution under the provisions of this subsection, the insured deposits of each depositor in the depository institution on the date of such termination, less all subsequent withdrawals from any deposits of such depositor, shall continue for a period of at least 6 months or up to 2 years, within the discretion of the Board of Directors to be insured, and the depository institution shall continue to pay to the Corporation assessments as in the case of an insured depository institution during such period. No additions to any such deposits and no new deposits in such depository institution made after the date of such termination shall be insured by the Corporation, and the depository institution shall not advertise or hold itself out as having insured deposits unless in the same connection it shall also state with equal prominence that such additions to deposits and new deposits made after such date are not so insured. Such depository institution shall, in all other respects, be subject to the duties and obligations of an insured depository institution for the period [1] referred to in the 1st sentence from the date of such termination, and in the event that such depository institution shall be closed on account of inability to meet the demands of its depositors within such period, the Corporation shall have the same powers and rights with respect to such depository institution as in case of an insured depository institution.

(8) Temporary suspension of insurance

(A) In general

If the Board of Directors initiates a termination proceeding under paragraph (2), and the Board of Directors, after consultation with the appropriate Federal banking agency, finds that an insured depository institution (other than a savings association to which subparagraph (B)

[1] So in original.

applies) has no tangible capital under the capital guidelines or regulations of the appropriate Federal banking agency, the Corporation may issue a temporary order suspending deposit insurance on all deposits received by the institution.

(B) Special rule for certain savings institutions

(i) Certain goodwill included in tanglible capital

In determining the tangible capital of a savings association for purposes of this paragraph, the Board of Directors shall include goodwill to the extent it is considered a component of capital under section 1464 (t) of this title. Any savings association which would be subject to a suspension order under subparagraph (A) but for the operation of this subparagraph, shall be considered by the Corporation to be a "special supervisory association."

(ii) Suspension order

The Corporation may issue a temporary order suspending deposit insurance on all deposits received by a special supervisory association whenever the Board of Directors determines that—

(I) the capital of such association, as computed utilizing applicable accounting standards, has suffered a material decline;

(II) that such association (or its directors or officers) is engaging in an unsafe or unsound practice in conducting the business of the association;

(III) that such association is in an unsafe or unsound condition to continue operating as an insured association; or

(IV) that such association (or its directors or officers) has violated any applicable law, rule, regulation, or order, or any condition imposed in writing by a Federal banking agency, or any written agreement including a capital improvement plan entered into with any Federal banking agency, or that the association has failed to enter into a capital improvement plan which is acceptable to the Corporation within the time period set forth in section 1464(t) of this title.

Nothing in this paragraph limits the right of the Corporation or the Director of the Office of Thrift Supervision to enforce a contractual provision which authorizes the Corporation or the Director of the Office of Thrift Supervision, as a successor to the Federal Savings and Loan Insurance Corporation or the Federal Home Loan Bank Board, to require a savings association to write down or amortize goodwill at a faster rate than otherwise required under this chapter or under applicable accounting standards.

(C) Effective period of temporary order

Any order issued under subparagraph (A) shall become effective not earlier than 10 days from the date of service upon the institution and, unless set aside, limited, or suspended by a court in proceedings authorized hereunder, such temporary order shall remain effective and

enforceable until an order of the Board under paragraph (3) becomes final or until the Corporation dismisses the proceedings under paragraph (3).

(D) Judicial review

Before the close of the 10-day period beginning on the date any temporary order has been served upon an insured depository institution under subparagraph (A), such institution may apply to the United States District Court for the District of Columbia, or the United States district court for the judicial district in which the home office of the institution is located, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order, and such court shall have jurisdiction to issue such injunction.

(E) Continuation of insurance for prior deposits

The insured deposits of each depositor in such depository institution on the effective date of the order issued under this paragraph, minus all subsequent withdrawals from any deposits of such depositor, shall continue to be insured, subject to the administrative proceedings as provided in this chapter.

(F) Publication of order

The depository institution shall give notice of such order to each of its depositors in such manner and at such times as the Board of Directors may find to be necessary and may order for the protection of depositors.

(G) Notice by corporation

If the Corporation determines that the depository institution has not substantially complied

with the notice to depositors required by the Board of Directors, the Corporation may provide such notice in such manner as the Board of Directors may find to be necessary and appropriate.

(H) Lack of notice

Notwithstanding subparagraph (A), any deposit made after the effective date of a suspension order issued under this paragraph shall remain insured to the extent that the depositor establishes that—

(i) such deposit consists of additions made by automatic deposit the depositor was unable to prevent; or

(ii) such depositor did not have actual knowledge of the suspension of insurance.

(9) Final decisions to terminate insurance

Any decision by the Board of Directors to—

(A) issue a temporary order terminating deposit insurance; or

(B) issue a final order terminating deposit insurance (other than under subsection (p) or (q) of this section);

shall be made by the Board of Directors and may not be delegated.

(10) Low- to moderate-income housing lender

In making any determination regarding the termination of insurance of a solvent savings association, the Corporation may consider the extent of the association's low- to moderate-income housing loans.

(b) Cease-and-desist proceedings

(1) If, in the opinion of the appropriate Federal banking agency, any insured depository institution, depository institution which has insured deposits, or any institution-

affiliated party is engaging or has engaged, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to engage, in an unsafe or unsound practice in conducting the business of such depository institution, or is violating or has violated, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to violate, a law, rule, or regulation, or any condition imposed in writing by the agency in connection with the granting of any application or other request by the depository institution or any written agreement entered into with the agency, the agency may issue and serve upon the depository institution or such party a notice of charges in respect thereof. The notice shall contain a statement of the facts constituting the alleged violation or violations or the unsafe or unsound practice or practices, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist therefrom should issue against the depository institution or the institution-affiliated party. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after service of such notice unless an earlier or a later date is set by the agency at the request of any party so served. Unless the party or parties so served shall appear at the hearing personally or by a duly authorized representative, they shall be deemed to have consented to the issuance of the cease-and-desist order. In the event of such consent, or if upon the record made at any such hearing, the agency shall find that any violation or unsafe or unsound practice specified in the notice of charges has been established, the agency may issue and serve upon the depository institution or the institution-affiliated party an order to cease and desist from any such violation or practice. Such order may, by provisions which may be mandatory or otherwise, require the depository institution or its institution-affiliated parties to cease and desist from the same, and, further, to take affirmative action to correct the conditions resulting from any such violation or practice.

(2) A cease-and-desist order shall become effective at the expiration of thirty days after the service of such order upon the depository institution or other person concerned (except in the case of a cease-and-desist order issued upon consent, which shall become effective at the time specified therein), and shall remain effective and enforceable as provided therein, except to such extent as it is stayed, modified, terminated, or set aside by action of the agency or a reviewing court.

(3) This subsection and subsections (c) through (s) and subsection (u) of this section shall apply to any bank holding company, and to any subsidiary (other than a bank) of a bank holding company, as those terms are defined in the Bank Holding Company Act of 1956 [12 U.S.C.A. § 1841 et seq.], and to any organization organized and operated under section 25(a) of the Federal Reserve Act [12 U.S.C.A. § 611 et seq.] or operating under section 25 of the Federal Reserve Act [12 U.S.C.A. § 601 et seq.], in the same manner as they apply to a State member insured depository institution. Nothing in this subsection or in subsection (c) of this section shall authorize any Federal banking agency, other than the Board of Governors of the Federal Reserve System, to issue a notice of charges or cease-and-desist order against a bank holding company or any subsidiary thereof (other than a bank or subsidiary of that bank).

(4) This subsection and subsections (c), (d), (h), (i), (k), (*l*), (m), and (n) of this section shall apply to any foreign bank or company to which subsection (a) of section 3106 of this title applies and to any subsidiary (other than a bank) of any such foreign bank or company in the same manner as they apply to a bank holding company and any subsidiary thereof (other than a bank) under subparagraph (3) of this subsection. For the purposes of this paragraph, the term "subsidiary" shall have the meaning assigned to it in section 2 of the Bank Holding Company Act of 1956 [12 U.S.C.A. § 1841].

(5) This section shall apply, in the same manner as it applies to any insured depository institution for which the appropriate Federal banking agency is the Comptroller of the Currency, to any national banking association chartered by the Comptroller of the Currency, including an uninsured association.

(6) Affirmative action to correct conditions resulting from violations or practices. The authority to issue an order under this subsection and subsection (c) of this section which requires an insured depository institution or any institution-affiliated party to take affirmative action to correct any conditions resulting from any violation or practice with respect to which such order is issued includes the authority to require such depository institution or such party to—

(A) make restitution or provide reimbursement, indemnification, or guarantee against loss if—

(i) such depository institution or such party was unjustly enriched in connection with such violation or practice; or

(ii) the violation or practice involved a reckless disregard for the law or any applicable regulations or prior order of the appropriate Federal banking agency;

(B) restrict the growth of the institution;

(C) dispose of any loan or asset involved;

(D) rescind agreements or contracts; and

(E) employ qualified officers or employees (who may be subject to approval by the appropriate Federal banking agency at the direction of such agency); and

(F) take such other action as the banking agency determines to be appropriate.

(7) Authority to limit activities. The authority to issue an order under this subsection or subsection (c) of this section includes the authority to place limitations on the activities or functions of an insured depository institution or any institution-affiliated party.

(8) Expansion of authority to savings and loan affiliates and entities. Subsections (a) through (s) and subsection (u) of this section shall apply to any savings and loan holding company and to any subsidiary (other than a bank or subsidiary of that bank) of a savings and loan holding company, to any service corporation of a savings association and to any subsidiary of such service corporation, whether wholly or partly owned, in the same manner as such subsections apply to a savings association.

(c) Temporary cease-and-desist orders

(1) Whenever the appropriate Federal banking agency shall determine that the violation or threatened violation or the unsafe or unsound practice or practices, specified in the notice of charges served upon the depository institution or any institution-affiliated party pursuant to paragraph (1) of subsection (b) of this section, or the continuation thereof, is likely to cause insolvency or significant dissipation of assets or earnings of the depository institution, or is likely to weaken the condition of the depository institution or otherwise prejudice the interests of its depositors prior to the completion of the proceedings conducted pursuant to paragraph (1) of subsection (b) of this section, the agency may issue a temporary order requiring the depository institution or such party to cease and desist from any such violation or practice and to take affirmative action to prevent such insolvency, dissipation, condition, or prejudice pending completion of such proceedings. Such order may include any requirement authorized under subsection (b)(6)(B) of this section. Such order shall become effective upon service upon the depository institution or such institution-affiliated party and, unless set aside, limited, or suspended by a court in proceedings authorized by paragraph (2) of this subsec-

tion, shall remain effective and enforceable pending the completion of the administrative proceedings pursuant to such notice and until such time as the agency shall dismiss the charges specified in such notice, or if a cease-and-desist order is issued against the depository institution or such party, until the effective date of such order.

(2) Within ten days after the depository institution concerned or any institution-affiliated party has been served with a temporary cease-and-desist order, the depository institution or such party may apply to the United States district court for the judicial district in which the home office of the depository institution is located, or the United States District Court for the District of Columbia, for an injunction [2] setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the depository institution or such party under paragraph (1) of subsection (b) of this section, and such court shall have jurisdiction to issue such injunction.

(3) Incomplete or inaccurate records

(A) Temporary order. If a notice of charges served under subsection (b)(1) of this section specifies, on the basis of particular facts and circumstances, that an insured depository institution's books and records are so incomplete or inaccurate that the appropriate Federal banking agency is unable, through the normal supervisory process, to determine the financial condition of that depository institution or the details or purpose of any transaction or transactions that may have a material effect on the financial condition of that depository institution, the agency may issue a temporary order requiring—

(i) the cessation of any activity or practice which gave rise, whether in whole or in part,

[2] So in original. Probably should be "injunction."

to the incomplete or inaccurate state of the books or records; or

(ii) affirmative action to restore such books or records to a complete and accurate state, until the completion of the proceedings under subsection (b)(1) of this section.

(B) Effective period. Any temporary order issued under subparagraph (A)—

(i) shall become effective upon service; and

(ii) unless set aside, limited, or suspended by a court in proceedings under paragraph (2), shall remain in effect and enforceable until the earlier of—

(I) the completion of the proceeding initiated under subsection (b)(1) of this section in connection with the notice of charges; or

(II) the date the appropriate Federal banking agency determines, by examination or otherwise, that the insured depository institution's books and records are accurate and reflect the financial condition of the depository institution.

(d) Temporary cease-and-desist orders; enforcement

In the case of violation or threatened violation of, or failure to obey, a temporary cease-and-desist order issued pursuant to paragraph (1) of subsection (c) of this section, the appropriate Federal banking agency may apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the home office of the depository institution is located, for an injunction to enforce such order, and, if the court shall determine that there has been such violation or threatened

violation or failure to obey, it shall be the duty of the court to issue such injunction.

(e) Removal and prohibition authority

(1) Authority to issue order. Whenever the appropriate Federal banking agency determines that—

(A) any institution-affiliated party has, directly or indirectly—

(i) violated—

(I) any law or regulation;

(II) any cease-and-desist order which has become final;

(III) any condition imposed in writing by the appropriate Federal banking agency in connection with the grant of any application or other request by such depository institution; or

(IV) any written agreement between such depository institution and such agency;

(ii) engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution; or

(iii) committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty;

(B) by reason of the violation, practice, or breach described in any clause of subparagraph (A)—

(i) such insured depository institution or business institution has suffered or will probably suffer financial loss or other damage;

(ii) the interests of the insured depository institution's depositors have been or could be prejudiced; or

(iii) such party has received financial gain or other benefit by reason of such violation, practice, or breach; and

(C) such violation, practice, or breach—

(i) involves personal dishonesty on the part of such party; or

(ii) demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution or business institution,

the agency may serve upon such party a written notice of the agency's intention to remove such party from office or to prohibit any further participation by such party, in any manner, in the conduct of the affairs of any insured depository institution.

(2) Whenever, in the opinion of the appropriate Federal banking agency, any director or officer of an insured depository institution has committed any violation of the Depository Institution Management Interlocks Act [12 U.S.C.A. § 3201 et seq.], the agency may serve upon such director or officer a written notice of its intention to remove him from office.

(3) Suspension order

(A) Suspension or prohibition authorized. If the appropriate Federal banking agency serves written notice under paragraph (1) or (2) to any institution-affiliated party of such agency's intention to issue an order under such paragraph, the appropriate Federal banking agency may suspend such party from office or prohibit such party from further participation in any manner in the conduct of the affairs of the depository institution, if the agency—

(i) determines that such action is necessary for the protection of the depository institution or the interests of the depository institution's depositors; and

(ii) serves such party with written notice of the suspension order.

(B) Effective period. Any suspension order issued under subparagraph (A)—

(i) shall become effective upon service; and

(ii) unless a court issues a stay of such order under subsection (f) of this section, shall remain in effect and enforceable until—

(I) the date the appropriate Federal banking agency dismisses the charges contained in the notice served under paragraph (1) or (2) with respect to such party; or

(II) the effective date of an order issued by the agency to such party under paragraph (1) or (2).

(C) Copy of order. If an appropriate Federal banking agency issues a suspension order under subparagraph (A) to any institution-affiliated party, the agency shall serve a copy of such order on any insured depository institution with which such party is associated at the time such order is issued.

(4) A notice of intention to remove an institution-affiliated party from office or to prohibit such party from participating in the conduct of the affairs of an insured depository institution, shall contain a statement of the facts constituting grounds therefor, and shall fix a time and place at which a hearing will be held thereon. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after the date of service of such notice, unless an earlier or a later date is set by

the agency at the request of (A) such party, and for good cause shown, or (B) the Attorney General of the United States. Unless such party shall appear at the hearing in person or by a duly authorized representative, such party shall be deemed to have consented to the issuance of an order of such removal or prohibition. In the event of such consent, or if upon the record made at any such hearing the agency shall find that any of the grounds specified in such notice have been estabilshed, the agency may issue such orders of suspension or removal from office, or prohibition from participation in the conduct of the affairs of the depository institution, as it may deem appropriate. In any action brought under this section by the Comptroller of the Currency in respect to any such party with respect to a national banking association or a District depository institution, the findings and conclusions of the Administrative Law Judge shall be certified to the Board of Governors of the Federal Reserve System for the determination of whether any order shall issue. Any such order shall become effective at the expiration of thirty days after service upon such depository institution and such party (except in the case of an order issued upon consent, which shall become effective at the time specified therein). Such order shall remain effective and enforceable except to such extent as it is stayed, modified, terminated, or set aside by action of the agency or a reviewing court.

(5) For the purpose of enforcing any law, rule, regulation, or cease-and-desist order in connection with an interlocking relationship, the term "officer" within the term "institution-affiliated party" as used in this subsection means an employee or officer with management functions, and the term "director" within the term "institution-affiliated party" as used in this subsection includes an advisory or honorary director, a trustee of a depository institution under the control of trustees, or any person who has a representative or a nominee serving in any such capacity.

(6) Prohibition of certain activities. Any person subject to an order issued under this subsection shall not—

(A) participate in any manner in the conduct of the affairs of any institution or agency specified in paragraph (7)(A);

(B) solicit, procure, transfer, attempt to transfer, vote, or attempt to vote any proxy, consent, or authorization with respect to any voting rights in any institution described in subparagraph (A);

(C) violate any voting agreement previously approved by the appropriate Federal banking agency; or

(D) vote for a director, or serve or act as an institution-affiliated party.

(7) Industrywide prohibition

(A) In general. Except as provided in subparagraph (B), any person who, pursuant to an order issued under this subsection or subsection (g) of this section, has been removed or suspended from office in an insured depository institution or prohibited from participating in the conduct of the affairs of an insured depository institution may not, while such order is in effect, continue or commence to hold any office in, or participate in any manner in the conduct of the affairs of—

(i) any insured depository institution;

(ii) any institution treated as an insured bank under subsection (b)(3) or (b)(4) of this section, or as a savings association under subsection (b)(8) of this section;

(iii) any insured credit union under the Federal Credit Union Act [12 U.S.C.A. § 1781 et seq.];

(iv) any institution chartered under the Farm Credit Act of 1971 [12 U.S.C.A. § 2001 et seq.];

(v) any appropriate Federal depository institution regulatory agency;

(vi) the Federal Housing Finance Board and any Federal home loan bank; and

(vii) the Resolution Trust Corporation.

(B) Exception if agency provides written consent. If, on or after the date an order is issued under this subsection which removes or suspends from office any institution-affiliated party or prohibits such party from participating in the conduct of the affairs of an insured depository institution, such party receives the written consent of—

(i) the agency that issued such order; and

(ii) the appropriate Federal financial institutions regulatory agency of the institution described in any clause of subparagraph (A) with respect to which such party proposes to become an institution-affiliated party,

subparagraph (A) shall, to the extent of such consent, cease to apply to such party with respect to the institution described in each written consent. Any agency that grants such a written consent shall report such action to the Corporation and publicly disclose such consent.

(C) Violation of paragraph treated as violation of order. Any violation of subparagraph (A) by any person who is subject to an order described in such subparagraph shall be treated as a violation of the order.

(D) Appropriate Federal financial institutions regulatory agency defined. For purposes of this para-

graph and subsection (j) of this section, the term "appropriate Federal financial institutions regulatory agency" means—

(i) the appropriate Federal banking agency, in the case of an insured depository institution;

(ii) the Farm Credit Administration, in the case of an institution chartered under the Farm Credit Act of 1971 [12 U.S.C.A. § 2001 et seq.];

(iii) the National Credit Union Administration Board, in the case of an insured credit union (as defined in section 101(7) of the Federal Credit Union Act [12 U.S.C.A. § 1752(7)]);

(iv) the Secretary of the Treasury, in the case of the Federal Housing Finance Board and any Federal home loan bank; and

(v) the Oversight Board, in the case of the Resolution Trust Corporation.

(E) Consultation between agencies. The agencies referred to in clauses (i) and (ii) of subparagraph (B) shall consult with each other before providing any written consent described in subparagraph (B).

(F) Applicability. This paragraph shall only apply to a person who is an individual, unless the appropriate Federal banking agency specifically finds that it should apply to a corporation, firm, or other business enterprise.

(f) Stay of suspension and/or prohibition of institution-affiliated party

Within ten days after any institution-affiliated party has been suspended from office and/or prohibited from participation in the conduct of the affairs of an insured depository institution under subsection (e)(3) of this section,

such party may apply to the United States district court for the judicial district in which the home office of the depository institution is located, or the United States District Court for the District of Columbia, for a stay of such suspension and/or prohibition pending the completion of the administrative proceedings pursuant to the notice served upon such party under subsection (e)(1) or (e)(2) of this section, and such court shall have jurisdiction to stay such suspension and/or prohibition.

(g) Suspension or removal of institution-affiliated party charged with felony

(1) Whenever any institution-affiliated party, is charged in any information, indictment, or complaint, with the commission of or participation in a crime involving dishonesty or breach of trust which is punishable by imprisonment for a term exceeding one year under State or Federal law, the appropriate Federal banking agency may, if continued service or participation by such party may pose a threat to the interests of the depository institution's depositors or may threaten to impair public confidence in the depository institution, by written notice served upon such party, suspend such party from office or prohibit such party from further participation in any manner in the conduct of the affairs of the depository institution. A copy of such notice shall also be served upon the depository institution. Such suspension or prohibition shall remain in effect until such information, indictment, or complaint is finally disposed of or until terminated by the agency. In the event that a judgment of conviction or an agreement to enter a pre-trial diversion or other similar program is entered against such party, and at such time as such judgment is not subject to further appellate review, the agency may, if continued service or participation by such party may pose a threat to the interests of the depository institution's depositors or may threaten to impair public confidence in the depository institution, issue and

serve upon such party an order removing such party from office or prohibiting such party from further participation in any manner in the conduct of the affairs of the depository institution except with the consent of the appropriate agency. A copy of such order shall also be served upon such depository institution, whereupon such party (if a director or an officer) shall cease to be a director or officer of such depository institution. A finding of not guilty or other disposition of the charge shall not preclude the agency from thereafter instituting proceedings to remove such party from office or to prohibit further participation in depository institution affairs, pursuant to paragraph (1), (2), or (3) of subsection (e) of this section. Any notice of suspension or order of removal issued under this paragraph shall remain effective and outstanding until the completion of any hearing or appeal authorized under paragraph (3) hereof unless terminated by the agency.

(2) If at any time, because of the suspension of one or more directors pursuant to this section, there shall be on the board of directors of a national depository institution less than a quorum of directors not so suspended, all powers and functions vested in or exercisable by such board shall vest in and be exercisable by the director or directors on the board not so suspended, until such time as there shall be a quorum of the board of directors. In the event all of the directors of a national depository institution are suspended pursuant to this section, the Comptroller of the Currency shall appoint persons to serve temporarily as directors in their place and stead pending the termination of such suspensions, or until such time as those who have been suspended, cease to be directors of the depository institution and their respective successors take office.

(3) Within thirty days from service of any notice of suspension or order of removal issued pursuant to paragraph (1) of this subsection, the institution-affiliated party

concerned may request in writing an opportunity to appear before the agency to show that the continued service to or participation in the conduct of the affairs of the depository institution by such party does not, or is not likely to, pose a threat to the interests of the depository institution's depositors or threaten to impair public confidence in the depository institution. Upon receipt of any such request, the appropriate Federal banking agency shall fix a time (not more than thirty days after receipt of such request, unless extended at the request of such party) and place at which such party may appear, personally or through counsel, before one or more members of the agency or designated employees of the agency to submit written materials (or, at the discretion of the agency, oral testimony) and oral arguments. Within sixty days of such hearing, the agency shall notify such party whether the suspension or prohibition from participation in any manner in the conduct of the affairs of the depository institution will be continued, terminated, or otherwise modified, or whether the order removing such party from office or prohibiting such party from further participation in any manner in the conduct of the affairs of the depository institution will be rescinded or otherwise modified. Such notification shall contain a statement of the basis for the agency's decision, if adverse to such party. The Federal banking agencies are authorized to prescribe such rules as may be necessary to effectuate the purposes of this subsection.

(h) Hearings and judicial review

(1) Any hearing provided for in this section (other than the hearing provided for in subsection (g)(3) of this section) shall be held in the Federal judicial district or in the territory in which the home office of the depository institution is located unless the party afforded the hearing consents to another place, and shall be conducted in accordance with the provisions of chapter 5 of Title 5. Such hearing shall be private, unless the appropriate Fed-

eral banking agency, in its discretion, after fully considering the views of the party afforded the hearing, determines that a public hearing is necessary to protect the public interest. After such hearing, and within ninety days after the appropriate Federal banking agency or Board of Governors of the Federal Reserve System has notified the parties that the case has been submitted to it for final decision, it shall render its decision (which shall include findings of fact upon which its decision is predicated) and shall issue and serve upon each party to the proceeding an order or orders consistent with the provisions of this section. Judicial review of any such order shall be exclusively as provided in this subsection (h) of this section. Unless a petition for review is timely filed in a court of appeals of the United States, as hereinafter provided in paragraph (2) of this subsection, and thereafter until the record in the proceeding has been filed as so provided, the issuing agency may at any time, upon such notice and in such manner as it shall deem proper, modify, terminate, or set aside any such order. Upon such filing of the record, the agency may modify, terminate, or set aside any such order with permission of the court.

(2) Any party to any proceeding under paragraph (1) may obtain a review of any order served pursuant to paragraph (1) of this subsection (other than an order issued with the consent of the depository institution or the institution-affiliated party concerned, or an order issued under paragraph (1) of subsection (g) of this section) by the filing in the court of appeals of the United States for the circuit in which the home office of the depository institution is located, or in the United States Court of Appeals for the District of Columbia Circuit, within thirty days after the date of service of such order, a written petition praying that the order of the agency be modified, terminated, or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the agency, and thereupon the agency shall file

in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon the filing of such petition, such court shall have jurisdiction, which upon the filing of the record shall except as provided in the last sentence of said paragraph (1) be exclusive, to affirm, modify, terminate, or set aside, in whole or in part, the order of the agency. Review of such proceedings shall be had as provided in chapter 7 of Title 5. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

(3) The commencement of proceedings for judicial review under paragraph (2) of this subsection shall not, unless specifically ordered by the court, operate as a stay of any order issued by the agency.

(i) Jurisdiction and enforcement; civil money penalty

(1) The appropriate Federal banking agency may in its discretion apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the home office of the depository institution is located, for the enforcement of any effective and outstanding notice or order issued under this section, and such courts shall have jurisdiction and power to order and require compliance herewith; but except as otherwise provided in this section no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order.

(2) Civil money penalty

(A) First tier. Any insured depository institution which, and any institution-affiliated party who—

(i) violates any law or regulation;

(ii) violates any final order or temporary order issued pursuant to subsection (b), (c), (e), (g), or (s) of this section;

(iii) violates any condition imposed in writing by the appropriate Federal banking agency in connection with the grant of any application or other request by such depository institution; or

(iv) violates any written agreement between such depository institution and such agency.

shall forfeit and pay a civil penalty of not more than $5,000 for each day during which such violation continues.

(B) Second tier. Notwithstanding subparagraph (A), any insured depository institution which, and any institution-affiliated party who—

(i)(I) commits any violation described in any clause of subparagraph (A);

(II) recklessly engages in an unsafe or unsound practice in conducting the affairs of such insured depository institution; or

(III) breaches any fiduciary duty;

(ii) which violation, practice, or breach—

(I) is part of a pattern of misconduct;

(II) causes or is likely to cause more than a minimal loss to such depository institution; or

(III) results in pecuniary gain or other benefit to such party,

shall forfeit and pay a civil penalty of not more than $25,000 for each day during which such violation, practice, or breach continues.

(C) Third tier. Notwithstanding subparagraphs (A) and (B), any insured depository institution which, and any institution-affiliated party who—

(i) knowingly—

(I) commits any violation described in any clause of subparagraph (A);

(II) engages in any unsafe or unsound practice in conducting the affairs of such depository institution; or

(III) breaches any fiduciary duty; and

(ii) knowingly or recklessly causes a substantial loss to such depository institution or a substantial pecuniary gain or other benefit to such party by reason of such violation, practice, or breach,

shall forfeit and pay a civil penalty in an amount not to exceed the applicable maximum amount determined under subparagraph (D) for each day during which such violation, practice, or breach continues.

(D) Maximum amounts of penalties for any violation described in subparagraph (c). The maximum daily amount of any civil penalty which may be assessed pursuant to subparagraph (C) for any violation, practice, or breach described in such subparagraph is—

(i) in the case of any person other than an insured depository institution, an amount to not exceed $1,000,000; and

(ii) in the case of any insured depository institution, an amount not to exceed the lesser of—

(I) $1,000,000; or

(II) 1 percent of the total assets of such institution.

(E) Assessment

(i) Written notice. Any penalty imposed under subparagraph (A), (B), or (C) may be assessed and collected by the appropriate Federal banking agency by written notice.

(ii) Finality of assessment. If, with respect to any assessment under clause (i), a hearing is not requested pursuant to subparagraph (H) within the period of time allowed under such subparagraph, the assessment shall constitute a final and unappealable order.

(F) Authority to modify or remit penalty. Any appropriate Federal banking agency may compromise, modify, or remit any penalty which such agency may assess or had already assessed under subparagraph (A), (B), or (C).

(G) Mitigating factors. In determining the amount of any penalty imposed under subparagraph (A), (B), or (C), the appropriate agency shall take into account the appropriateness of the penalty with respect to—

(i) the size of financial resources and good faith of the insured depository institution or other person charged;

(ii) the gravity of the violation;

(iii) the history of previous violations; and

(iv) such other matters as justice may require.

(H) Hearing. The insured depository institution or other person against whom any penalty is assesesd under this paragraph shall be afforded an agency hearing if such institution or person submits a re-

quest for such hearing within 20 days after the issuance of the notice of assessment.

(I) Collection

(i) Referral. If any insured depository institution or other person fails to pay an assessment after any penalty assessed under this paragraph has become final, the agency that imposed the penalty shall recover the amount assessed by action in the appropriate United States district court.

(ii) Appropriateness of penalty not reviewable. In any civil action under clause (i), the validity and appropriateness of the penalty shall not be subject to review.

(J) Disbursement. All penalties collected under authority of this paragraph shall be deposited into the Treasury.

(K) Regulations. Each appropriate Federal banking agency shall prescribe regulations establishing such procedures as may be necessary to carry out this paragraph.

(3) Notice under this section after separation from service. The resignation, termination of employment or participation, or separation of an institution-affiliated party (including a separation caused by the closing of an insured depository institution) shall not affect the jurisdiction and authority of the appropriate Federal banking agency to issue any notice and proceed under this section against any such party, if such notice is served before the end of the 6-year period beginning on the date such party ceased to be such a party with respect to such depository institution (whether such date occurs before, on, or after August 9, 1989).

(j) Criminal penalty

Whoever, being subject to an order in effect under subsection (e) or (g) of this section, without the prior written approval of the appropriate Federal financial institutions regulatory agency, knowingly participates, directly or indirectly, in any manner, including by engaging in an activity specifically prohibited in such an order or in subsection (e)(6) of this section) in the conduct of the affairs of—

(1) any insured depository institution;

(2) any institution treated as an insured bank under subsection (b)(3) or (b)(4) of this section, or as a savings association under subsection (b)(8) of this section;

(3) any insured credit union (as defined in section 1752(7) of this title);

(4) any institution chartered under the Farm Credit Act of [12 U.S.C.A. § 2001 et seq.]; or

(5) the Resolution Trust Corporation.

shall be fined not more than $1,000,000, imprisoned for not more than 5 years, or both.

(k) Repealed. Pub.L. 101-73, Title IX, § 920(c), Aug. 9, 1989, 103 Stat. 488.

(*l*) Notice of service

Any service required or authorized to be made by the appropriate Federal banking agency under this section may be made by registered mail, or in such other manner reasonably calculated to give actual notice as the agency may by regulation or otherwise provide. Copies of any notice or order served by the agency upon any State depository institution or any institution-affiliated party, pursuant to the provisions of this section, shall also be sent to the appropriate State supervisory authority.

(m) Notice to State authorities

In connection with any proceeding under subsection (b), (c)(1), or (e) of this section involving an insured State bank or any institution-affiliated party, the appropriate State supervisory authority with notice of the agency's intent to institute such a proceeding and the grounds therefor. Unless within such time as the Federal banking agency deems appropriate in the light of the circumstances of the case (which time must be specified in the notice prescribed in the preceding sentence) satisfactory corrective action is effectuated by action of the State supervisory authority, the agency may proceed as provided in this section. No bank or other party who is the subject of any notice or order issued by the agency under this section shall have standing to raise the requirements of this subsection as ground for attacking the validity of any such notice or order.

(n) Ancillary provisions; subpena power, etc.

In the course of or in connection with any proceeding under this section, or in connection with any claim for insured deposits or any examination or investigation under section 1820(c) of this title, the agency conducting the proceeding, examination, or investigation or considering the claim for insured deposits, or any member or designated representative thereof, including any person designated to conduct any hearing under this section, shall have the power to administer oaths and affirmations, to take or cause to be taken depositions, and to issue, revoke, quash, or modify subpenas and subpenas duces tecum; and such agency is empowered to make rules and regulations with respect to any such proceedings, claims, examinations, or investigations. The attendance of witnesess and the production of documents provided for in this subsection may be required from any place in any State or in any territory or other place subject to the jurisdiction of the United States at any designated place

where such proceeding is being conducted. Any such agency or any party to proceedings under this section may apply to the United States District Court for the District of Columbia, or the United States district court for the judicial district or the United States court in any territory in which such proceeding is being conducted, or where the witness resides or carries on business, for enforcement of any subpena or subpena duces tecum issued pursuant to this subsection, and such courts shall have jurisdiction and power to order and require compliance therewith. Witnesess subpenaed under this subsection shall be paid the same fees and mileage that are paid witnesses in the district courts of the United States. Any court having jurisdiction of any proceeding instituted under this section by an insured depository institution or a director or officer thereof, may allow to any such party such reasonable expenses and attorneys' fees as it deems just and proper; and such expenses and fees shall be paid by the depository institution or from its assets. Any person who willfully shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in such person's power to do so, in obedience to the subpoena of the appropriate Federal banking agency, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year or both.

(o) Termination of membership of State bank in Federal Reserve System

Whenever the insured status of a State member bank shall be terminated by action of the Board of Directors, the Board of Governors of the Federal Reserve System shall terminate its membership in the Federal Reserve System in accordance with the provisions of subchapter VIII of chapter 3 of this title, and whenever the insured status

of a national member bank shall be so terminated the Comptroller of the Currency shall appoint a receiver for the bank, which shall be the Corporation. Except as provided in subsection (b) of section 1814 of this title, whenever a member bank shall cease to be a member of the Federal Reserve System, its status as an insured depository institution shall, without notice or other action by the board of directors, terminate on the date the bank shall cease to be a member of the Federal Reserve System, with like effect as if its insured status had been terminated on said date by the board of directors after proceedings under subsection (a) of this section. Whenever the insured status of an insured Federal savings bank shall be terminated by action of the Board of Directors, the Director of the Office of Thrift Supervision shall appoint a receiver for the bank, which shall be the Corporation.

(p) Banking institutions not receiving deposits

Nothwithstanding any other provision of law, whenever the Board of Directors shall determine that an insured banking institution is not engaged in the business of receiving deposits, other than trust funds as herein defined, the Corporation shall notify the banking institution that its insured status will terminate at the expiration of the first full semiannual assessment period following such notice. A finding by the Board of Directors that a banking institution is not engaged in the business of receiving deposits, other than such trust funds, shall be conclusive. The Board of Directors shall prescribe the notice to be given by the banking institution of such termination and the Corporation may publish notice thereof. Upon the termination of the insured status of any such banking institution, its deposits shall thereupon cease to be insured and the banking institution shall thereafter be relieved of all future obligations to the Corporation, including the obligation to pay future assessments.

(q) Assumption of liabilities

Whenever the liabilities of an insured depository institution for deposits shall have been assumed by another insured depository institution or depository institutions, whether by way of merger, consolidation, or other statutory assumption, or pursuant to contract (1) the insured status of the depository institution whose liabilities are so assumed shall terminate on the date of receipt by the Corporation of satisfactory evidence of such assumption; (2) the separate insurance of all deposits so assumed shall terminate at the end of six months from the date such assumption takes effect or, in the case of any time deposit, the earliest maturity date after the six-month period. Where the deposits of an insured depository institution are assumed by a newly insured depository institution, the depository institution whose deposits are assumed shall not be required to pay any assessment upon the deposits which have been so assumed after the semiannual period in which the assumption takes effect.

(r) Action or proceeding against foreign bank; basis; removal of officer or other person; venue; service of process

(1) Except as otherwise specifically provided in this section, the provisions of this section shall be applied to foreign banks in accordance with this subsection.

(2) An act or practice outside the United States on the part of a foreign bank or any officer, director, employee, or agent therof [3] may not constitute the basis for any action by any officer or agency of the United States under this section, unless—

(A) such officer or agency alleges a belief that such act or practice has been, is, or is likely to be a cause of or carried on in connection with or in furtherance of an act or practice within any one or more States which, in and of itself, would constitute an ap-

[3] So in original. Probably should be "thereof".

propriate basis for action by a Federal officer or agency under this section; or

(B) the alleged act or practice is one which, if proven, would, in the judgment of the Board of Directors, adversely affect the insurance risk assumed by the Corporation.

(3) In any case in which any action or proceeding is brought pursuant to an allegation under paragraph (2) of this subsection for the suspension or removal of any officer, director, or other person associated with a foreign bank, and such person fails to appear promptly as a party to such action or proceeding and to comply with any effective order or judgment therein, any failure by the foreign bank to secure his removal from any office he holds in such bank and from any further participation in its affairs shall, in and of itself, constitute grounds for termination of the insurance of the deposits in any branch of the bank.

(4) Where the venue of any judicial or administrative proceeding under this section is to be determined by reference to the location of the home office of a bank, the venue of such a proceeding with respect to a foreign bank having one or more branches or agencies in not more than one judicial district or other relevant jurisdiction shall be within such jurisdiction. Where such a bank has branches or agencies in more than one such jurisdiction, the venue shall be in the jurisdiction within which the branch or branches or agency or agencies involved in the proceeding are located, and if there is more than one such jurisdiction, the venue shall be proper in any such jurisdiction in which the proceeding is brought or to which it may appropriately be transferred.

(5) Any service required or authorized to be made on a foreign bank may be made on any branch or agency located within any State, but if such service is in connec-

tion with an action or proceeding involving one or more branches or one or more agencies located in any State, service shall be made on at least one branch or agency so involved.

(s) Compliance with monetary transaction recordkeeping and report requirements

(1) Compliance procedures required

Each appropriate Federal banking agency shall prescribe regulations requiring insured depository institutions to establish and maintain procedures reasonably designed to assure and monitor the compliance of such depository institutions with the requirements of subchapter II of chapter 53 of Title 31.

(2) Examination of bank to include review of compliance procedures

(A) In general

Each examination of an insured depository institution by the appropriate Federal banking agency shall include a review of the procedures required to be established and maintained under paragraph (1).

(B) Exam report requirement

The report of examination shall describe any problem with the procedures maintained by the insured depository institution.

(3) Order to comply with requirements

If the appropriate Federal banking agency determines that an insured depository institution—

(A) has failed to establish and maintain the procedures described in paragraph (1); or

(B) has failed to correct any problem with the procedures maintained by such depository

institution which was previously reported to the depository institution by such agency,

the agency shall issue an order in the manner prescribed in subsection (b) or (c) of this section requiring such depository institution to cease and desist from its violation of this subsection or regulations prescribed under this subsection.

(t) Authority of Board to take enforcement action against savings associations

(1) Authority to recommend that Director of Office of Thrift Supervision take enforcement action

The Corporation, based on an examination of a savings association by the Corporation or by the Director of the Office of Thrift Supervision or on other information, may recommend that the Director take any enforcement action authorized under section 1817(j) of this title, this section, or section 1828(j) of this title with respect to any savings association.

(2) Authority of Board to order corporation to take enforcement action if Director of Office of Thrift Supervision fails to follow recommendation

If the Director fails to take the recommended action or to provide an acceptable plan for addressing the concerns of the Corporation as set forth in its recommendation before the close of the 60-day period beginning on the date of the receipt of the formal recommendation from the Corporation, the Board of Directors may order the Corporation to take such action if the Board determines that—

(A) the association is in an unsafe or unsound condition; or

(B) failure to take the recommended action will result in continuance of unsafe or unsound

practices in conducting the business of the savings association.

(3) Effect of exigent circumstances

(A) Authority to act

Notwithstanding paragraphs (1) and (2), the Board of Directors may order the Corporation to exercise its authority, without regard to the time period set forth, in exigent circumstances after notifying the Director.

(B) Agreement on exigent circumstances

The Corporation shall, by agreement with the Director, set forth those exigent circumstances in which the Corporation may act without regard to the time period set forth above.

(4) Requests for formal actions and investigations

(A) Submission of requests

The regional offices of the Office of Thrift Supervision shall concurrently submit all requests for formal investigations or enforcement actions to both the Director and the Corporation.

(B) Director required to report on requests

The Director shall report semiannually to the Corporation the status or disposition of all such requests, including the reasons for the Director's decision to either approve or deny all such requests.

(5) Nondelegation

Any decisions by the Board of Directors to order actions described in this subsection shall not be delegated.

(u) Public disclosure of final orders

(1) In general

The appropriate Federal banking agency shall publish and make available to the public—

(A) any final order issued with respect to any administrative enforcement proceeding initiated by such agency under this section or any other provision of law; and

(B) any modification to or termination of any final order described in subparagraph (A) of this paragraph.

(2) Delay of publication under exceptional circumstances

If the appropriate Federal banking agency makes a determination in writing that the publication of any final order pursuant to paragraph (1) would seriously threaten the safety or soundness of an insured depository institution, such agency may delay the publication of such order for a reasonable time.

(Sept. 21, 1950, c. 967, § 2[8], 64 Stat. 879; Oct. 16, 1966, Pub. L. 89-695, Title II, §§ 202, 204, 80 Stat. 1046, 1054; Oct. 28, 1974, Pub. L. 93-495, Title I, § 110, 88 Stat. 1506; Sept. 17, 1978, Pub. L. 95-369, §§ 6(c)(14), (15), 11, 92 Stat. 618, 624; Nov. 10, 1978, Pub. L. 95-630, Title I, §§ 107(a)(1), (b), (c)(1), (d)(1), (e)(1), 111(a), Title II, § 208(a), Title III, §§ 303, 304, 92 Stat. 3649, 3653, 3654, 3656, 3660, 3665, 3674, 3676; Oct. 15, 1982, Pub.L. 97-320, Title I, § 113(g), (h), Title IV, §§ 404(c), 424(c), (d)(6), (e), 425(b), (c), 427(d), 433(a), 96 Stat. 1473, 1474, 1512, 1523-1527; Oct. 27, 1986, PubL. 99-570, Title I, § 1359(a), 100 Stat. 3207-27; Aug. 9, 1989, Pub.L. 101-73, Title II, § 201(a)(1), (b), Title IX, §§ 901(b)(1), (d), 902(a), 903(a), 904(a), 905(a), 906(a), 907(a), 908(a), 912, 913(a), 920(a), (c), 926, 103 Stat. 187, 188, 447, 450, 453, 457, 459, 462, 477, 482, 483, 488, 489.)

§ 1824. Treasury loans for insurance purposes; amount; rate of interest; public debt transactions; employment of funds for Bank Insurance Fund or Savings Association Insurance Fund

The Corporation is authorized to borrow from the Treasury, and the Secretary of the Treasury is authorized and directed to loan to the Corporation on such terms as may be fixed by the Corporation and the Secretary, such funds as in the judgment of the Board of Directors of the Corporation are from time to time required for insurance purposes, not exceeding in the aggregate $5,000,000,000 outstanding at any one time, subject to the approval of the Secretary of the Treasury: *Provided,* That the rate of interest to be charged in connection with any loan made pursuant to this section shall not be less than an amount determined by the Secretary of the Treasury, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable maturities. For such purpose the Secretary of the Treasury is authorized to use as a public-debt transaction the proceeds of the sale of any securities hereafter issued under chapter 31 of Title 31, and the purposes for which securities may be issued under chapter 31 of Title 31, are extended to include such loans. Any such loan shall be used by the Corporation solely in carrying out its functions with respect to such insurance. All loans and repayments under this section shall be treated as public-debt transactions of the United States. The Corporation may employ such funds for purposes of the Bank Insurance Fund or the Savings Association Insurance Fund and the borrowing shall become a liability of each such fund to the extent funds are employed therefor. There are hereby appropriated to the Secretary, for fiscal year 1989 and each fiscal year thereafter, such sums as may be necessary to carry out this section.

(Sept. 21, 1950, c. 967, § 2[14], 64 Stat. 890; Aug. 9, 1989, Pub.L. 101-73, Title II, § 218, 103 Stat. 261.)

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against hte United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

(June 25, 1948, c. 645, 62 Stat. 701; Sept. 13, 1994, Pub.L. 103-322, Title XXXIII, § 330016(1)(L), 108 Stat. 2147.)

§ 372. Conspiracy to impede or injure officer

If two or more persons in any State, Territory, Possession, or District conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof, or to induce by like means any officer of the United States to leave the place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties, each of such persons shall be fined not more than $5,000 or imprisoned not more than six years, or both.

(June 25, 1948, c. 645, 62 Stat. 701.)

§ 373. Solicitation to commit a crime of violence

(a) Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct, shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half of the maximum fine prescribed for the punishment of the crime solicited, or both; or if the crime solicited is punishable by life imprisonment or death, shall be imprisoned for not more than twenty years.

(b) It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited. A renunciation is not "voluntary and complete" if it is motivated in whole or in part by a decision to postpone the commission of the crime until another time or to substitute another victim or another but similar objective. If the defendant raises the affirmative defense at trial, the defendant has the burden of proving the defense by a preponderance of the evidence.

(c) It is not a defense to a prosecution under this section that the person solicited could not be convicted of the crime because he lacked the state of mind required for its commission, because he was incompetent or irresponsible, or because he is immune from prosecution or is not subject to prosecution.

(Added Pub.L. 98-473, Title II § 1003(a), Oct. 12, 1984, 98 Stat. 2138, and amended Pub.L. 99-646, § 26, Nov. 10, 1986, 100 Stat. 3597; Pub.L. 103-322, Title XXXIII, § 330016(2)(A), Sept. 13, 1994, 108 Stat. 2148.)

§ 655. Theft by bank examiner

Whoever, being a bank examiner or assistant examiner, steals, or unlawfully takes, or unlawfully conceals any money, note, draft, bond, or security or any other property of value in the possession of any bank or banking institution which is a member of the Federal Reserve System, which is insured by the Federal Deposit Insurance Corporation which is a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), or which is an organization operating under section 25 or section 25(a) of the Federal Reserve Act, or from any safe deposit box in or adjacent to the premises of such bank, branch, agency, or organization, shall be fined under this title or imprisoned not more than five years, or both; but if the amount taken or concealed does not exceed $100, he shall be fined under this title or imprisoned not more than one year, or both; and shall be disqualified from holding office as a national bank examiner or Federal Deposit Insurance Corporation examiner.

This section shall apply to all public examiners and assistant examiners who examine member banks of the Federal Reserve System, banks the deposits of which are insured by the Federal Deposit Insurance Corporation, branches or agencies of foreign banks (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), or organizations operating under section 25 or section 25(a) of the Federal Reserve Act, whether appointed by the Comptroller of the Currency, by the Board of Governors of the Federal Reserve System, by a Federal Reserve Agent, by a Federal Reserve bank, or by the Federal Deposit Insurance Corporation, or appointed or elected under the laws of any State; but shall not apply to private examiners or assistant examiners employed only by a clearing-house association or by the directors of a bank.

(June 25, 1948, c. 645, 62 Stat. 728; Nov. 29, 1990, Pub.L. 101-647, Title XXV, § 2597(e), 104 Stat. 4909; Sept. 13, 1994, Pub.L. 103-322, Title XXXIII, § 330016(1)(H), (K), 108 Stat. 2147.)

§ 656. Theft, embezzlement, or misapplication by bank officer or employee

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, depository institution holding company, national bank, insured bank, branch or agency of a foreign bank, or organization operating under section 25 or section 25(a) of the Federal Reserve Act,[1] or a receiver of a national bank, insured bank, branch, agency, or organization or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank, branch, agency, or organization or holding company or any moneys, funds, assets or securities intrusted to the custody or care of such bank, branch, agency, or organization, or holding company or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both: but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined under this title or imprisoned not more than one year, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation. For purposes of this section, the term "depository institution holding company" has the meaning given such term in section 3 of the Federal Deposit Insurance Act; and the term "branch or agency of a foreign bank" means a branch or agency described in section 20(9) of this title.

[1] So in original.

(June 25, 1948, c. 645, 62 Stat. 729; Aug. 9, 1989, Pub.L. 101-73. Title IX, § 961(b), 103 Stat. 499; Nov. 29, 1990, Pub.L. 101-647, Title XXV, §§ 2504(b), 2595(a)(1), 2597(f), 104 Stat. 4861, 4906, 4909; Sept. 13, 1994, Pub.L. 103-322., Title XXXIII § (3300161)(H), 108 Stat. 2147.)

§ 657. Lending, credit and insurance institutions

Whoever, being an officer, agent or employee of or connected in any capacity with the Federal Deposit Insurance Corporation, National Credit Union Administration, Office of Thrift Supervision, the Resolution Trust Corporation, any Federal home loan bank, the Federal Housing Finance Board. Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, the Secretary of Agriculture acting through the Farmers Home Administration, the Rural Development Administration or the Farm Credit System Insurance Corporation, a Farm Credit Bank, a bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution, other than an insured bank (as defined in section 656), the accounts of which are insured by the Federal Deposit Insurance Corporation or by the National Credit Union Administration Board or any small business investment company, or any community development financial institution receiving financial assistance under the Riegle Community Development and Regulatory Improvement Act of 1994, and whoever, being a receiver of any such institution, or agent or employee of the receiver,

embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined under this title or imprisoned not more than one year, or both.

(June 25, 1948, c. 645, 62 Stat. 729; May 24, 1949, c. 139, § 11, 63 Stat. 90; July 28, 1956, c. 773, § 1, 70 Stat. 714; Aug. 21, 1958, Pub.L. 85-699, Title VII, § 703, 72 Stat. 698; Oct. 4, 1961, Pub.L. 87-353, § 3(q), 75 Stat. 774; May 25, 1967, Pub.L. 90-19, § 24(a), 81 Stat. 27; Oct. 19, 1970, Pub.L. 91-468, § 4, 84 Stat. 1016; Aug. 9, 1989, Pub.L. 101-73, Title IX, §§ 961(c), 962(a)(7), (8)(A), 103 Stat. 499, 502; Nov. 28, 1990, Pub.L. 101-624, Title XXIII, § 2303(e), 104 Stat. 3981; Nov. 29, 1990, Pub.L. 101-647, Title XVI, § 1603, Title XXV, §§ 2504(c), 2595(a)(2), 104 Stat. 4843, 4861, 4907; Sept. 13, 1994, Pub.L. 103-322, Title XXXIII, §§ 330004(6), 330016(1)(H), 108 Stat. 2141, 2147; Sept. 23, 1994, Pub.L. 103-325, Title I, § 119(c), 108 Stat. 2188.)

§ 1003. Demands against the United States

Whoever knowingly and fraudulently demands or endeavors to obtain any share or sum in the public stocks of the United States, or to have any part thereof transferred, assigned, sold, or conveyed, or to have any annuity, dividend, pension, wages, gratuity, or other debt due from the United States, or any part thereof, received, or paid by virtue of any false, forged, or counterfeited power of attorney, authority, or instrument, shall be fined under this title or imprisoned not more than five years, or both; but if the sum or value so obtained or attempted to be obtained does not exceed $100, he shall be fined under this title or imprisoned not more than one year, or both.

(June 25, 1948, c. 645, 62 Stat. 749; Sept. 13, 1994, Pub.L. 103-322, Title XXXIII, § 330016(H), (L), 108 Stat. 2147.)

§ 1004. Certification of checks

Whoever, being an officer, director, agent, or employee of any Federal Reserve bank, member bank of the Federal Reserve System, insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act), branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), or organization operating under section 25 or section 25(a) of the Federal Reserve Act, certifies a check before the amount thereof has been regularly deposited in the bank, branch, agency, or organization, by the drawer thereof, or resorts to any device, or receives any fictitious obligation, directly or collaterally, in order to evade any of the provisions of law relating to certification of checks, shall be fined under this title or imprisoned not more than five years, or both.

(June 25, 1948, c. 645, 62 Stat. 749; Nov. 29, 1990, Pub.L. 101-647, Title XXV, § 2597(g), 104 Stat. 4910; Sept. 13, 1994, Pub.L. 103-322, Title XXXIII, §330016(1)(K), 108 Stat. 2147.)

§ 1005. Bank entries, reports and transactions

Whoever, being an officer, director, agent or employee of any Federal Reserve bank, member bank, depository institution holding company, national bank, insured bank, branch or agency of a foreign bank, or organization operating under section 25 or section 25(a) of the Federal Reserve Act, without authority from the directors of such bank, branch, agency, or organization or company, issues or puts in circulation any notes of such bank, branch, agency, or organization or company; or

Whoever, without such authority, makes, draws, issues, puts forth, or assigns any certificate of deposit, draft, order, bill of exchange, acceptance, note, debenture, bond, or other obligation, or mortgage, judgment or decree; or

Whoever makes any false entry in any book, report, or statement of such bank, company, branch, agency, or organization with intent to injure or defraud such bank, company, branch, agency, or organization, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, company, branch, agency, or organization, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, company, branch, agency, or organization, or the Board of Governors of the Federal Reserve System;

Whoever with intent to defraud the United States or any agency thereof, or any financial institution referred to in this section, participates or shares in or receives (directly or indirectly) any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such financial institution—

Shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank or trust company, which has become a member of one of the Federal Reserve banks; "insured bank" includes any state bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation; and the term "branch or agency of a foreign bank" means a branch or agency described in

section 20(9) of this title. For purposes of this section, the term "depository institution holding company" has the meaning given such term in section 3(w)(1) of the Federal Deposit Insurance Act.

(June 25, 1948, c. 645, 62 Stat. 750; Aug. 9, 1989, Pub.L. 101-73, Title IX, § 961(d), 103 Stat. 499; Nov. 29, 1990, Pub.L. 101-647, Title XXV, §§ 2504(d), 2595(a)(3), 2597(h), 104 Stat. 4861, 4907, 4910.)

Supreme Court, U.S.
FILED
FEB 13 1997
CLERK

(3)

No. 96-976

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOHN HUDSON, LARRY BARESEL, AND JACK BUTLER RACKLEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

WALTER DELLINGER
Acting Solicitor General
MARK M. RICHARD
Acting Assistant Attorney General
J. DOUGLAS WILSON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

18 pp

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars a criminal prosecution on charges of conspiracy, misapplication of bank funds, and making false banking entries because petitioners had previously paid $44,000 in civil penalty assessments imposed by the Comptroller of the Currency based on the same underlying conduct.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-8a, 69a-81a) are reported at 92 F.3d 1026 and 14 F.3d 536, respectively. The order of the district court (Pet. App. 9a-14a) is reported at 879 F. Supp. 1113. A prior order of the district court (Pet. App. 82a-88a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1996. A petition for rehearing was denied on September 20, 1996. Pet. App. 18a-19a. The petition for a writ of certiorari was filed on December

17, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In August 1992, a grand jury in the Western District of Oklahoma returned an indictment charging petitioners John Hudson, Larry Baresel, and Jack Rackley with conspiracy to misapply bank funds and to make false banking entries, in violation of 18 U.S.C. 371. Pet. App. 9a. In addition, the grand jury charged Hudson with 19 counts, Baresel with 15 counts, and Rackley with 17 counts of misapplication of bank funds, in violation of 18 U.S.C. 656. Rackley also was charged with two counts of making a false banking entry, in violation of 18 U.S.C. 1005. Pet. App. 9a. Before trial, petitioners moved to dismiss the indictment on double jeopardy grounds. The district court denied the motion, *id.* at 82a-88a, and petitioners appealed. The court of appeals reversed in part, vacated the district court's decision in part, and remanded for further proceedings. *Id.* at 69a-81a. On remand, the district court granted petitioners' motion to dismiss the indictment. *Id.* at 9a-14a. The court of appeals reversed. *Id.* at 1a-8a.

1. Petitioner Hudson was the majority owner of five banks in Oklahoma, including the First National Bank of Tipton, Oklahoma, and the First National Bank of Hammon, Oklahoma. In 1986 and 1987, petitioner Baresel was a member of the boards of directors of the Tipton and Hammon banks. During approximately the same period, petitioner Rackley was the president of the Tipton bank and a member of the board of directors of the Hammon bank. Pet. 3; Gov't C.A. App. 3.

On February 13, 1989, the Office of the Comptroller of the Currency issued a "Notice of Assessment of a Civil Money Penalty" against petitioners. Pet. App. 89a-98a. The Notice alleged that petitioners had violated 12 U.S.C. 84 and 375(b) and 12 C.F.R. 31.2(b) and 215.4(b) by causing the banks with which they were associated to make loans to nominee borrowers in a manner that allowed petitioners to receive the benefit of the loans. Pet. App. 92a-93a, 94a-95a. The Notice alleged that the nominee loans resulted in losses to the Tipton and Hammon banks of nearly $900,000 and contributed to their failures. *Id.* at 97a. The Notice assessed penalties of $100,000 against Hudson and $50,000 each against Baresel and Rackley. *Id.* at 89a. On August 31, 1989, the Comptroller issued a "Notice of Intention to Prohibit Further Participation" against each petitioner. *Id.* at 99a-128a. Each of those notices sought to prevent petitioners from "further participation, in any manner, in the conduct of the affairs of any insured depository institution." *Id.* at 99a, 109a, 119a.

In late 1989, each petitioner resolved the proceedings initiated by the Notices filed by the Comptroller by entering into a "Stipulation and Consent Order." Pet. App. 129a-143a. In those consent orders, Hudson agreed to pay a $16,500 assessment, Baresel agreed to pay a $15,000 assessment, and Rackley agreed to pay a $12,500 assessment. *Id.* at 130a, 140a, 135a. Each petitioner also agreed not to participate in banking activities without the written authorization of the Comptroller and any other applicable regulatory agency. *Id.* at 130a-131a, 136a-137a, 141a-142a. The consent orders further stated that they did not preclude the United States from bringing "other actions deemed

appropriate" against petitioners. *Id.* at 133a, 138a, 143a.

2. In August 1992, petitioners were indicted in the Western District of Oklahoma on charges of conspiracy, misapplication of bank funds, and making false bank entries. The violations charged in the indictment rested on the same conduct that formed the basis for the prior administrative proceeding brought by the Comptroller of the Currency. Pet. App. 69a. Petitioners moved to dismiss the indictment, arguing that their conviction on the charged offenses would result in multiple punishments, in violation of the Double Jeopardy Clause. *Id.* at 82a.

The district court denied the motions. Pet. App. 82a-87a. The court found that the "nonparticipation agreement and the agreed fines were solely remedial" and thus that they did not impose punishment on petitioners. *Id.* at 85a-86a. Because the administrative proceeding did not punish petitioners, the court concluded, conviction on the criminal indictment would not impose a second punishment on petitioners in violation of the Double Jeopardy Clause. The court also found that petitioners had waived any right to raise their double jeopardy claim by agreeing to the stipulation's provision that allowed the government to bring "other actions deemed appropriate." *Id.* at 88a.

3. The court of appeals vacated the district court's decision in part and remanded for further proceedings. Pet. App. 69a-81a. The court began by rejecting the district court's view that petitioners' stipulation that the government could bring "other actions deemed appropriate" precluded them from seeking a dismissal on double jeopardy grounds. *Id.* at 71a-72a. The court also held that, in considering double jeopardy claims under *United States* v. *Halper*, 490

U.S. 435 (1989), it would attach no significance to the fact that *Halper* involved a civil sanction that followed a criminal prosecution, rather than (as here) a criminal prosecution that followed a civil sanction. Pet. App. 75a.

Relying on *United States* v. *Bizzell*, 921 F.2d 263 (10th Cir. 1990), the court of appeals then held that petitioners were not "punished" by the stipulation provisions that barred them from engaging in further banking activity, because those provisions were a "means of protecting the integrity of the banking system and the interests of depositors" and thus had "a legitimate remedial purpose." Pet. App. 75a-78a. The court concluded, however, that the existing record did not permit the same conclusion with respect to the monetary sanctions. In particular, the court expressed doubt that the statutes under which the Comptroller had imposed the monetary sanctions were "exclusively remedial." *Id.* at 79a. The court also concluded that the district court's "determination that the amounts of the fines were reasonable was without any factual support in the record," because the district court "made no findings as to the actual losses incurred nor who may have suffered the losses, and how they compared to the sanctions imposed." *Id.* at 80a.

The court of appeals accordingly vacated the district court's ruling that the monetary sanctions were remedial, and it remanded to the district court with instructions to determine "the precise injury caused to the Government for which the sanctions are the remedy." Pet. App. 80a. If the district court found that the government had been injured, the court of appeals instructed the district court to determine "if the fines were in fact intended solely to remedy the

injury, which will include a determination whether they were reasonable." *Id.* at 81a. The court of appeals noted that the district court might also have to decide whether the civil and criminal proceedings "relate[d] to the same offense" for double jeopardy purposes. *Ibid.*

4. On remand, after an evidentiary hearing, the district court reversed its prior decision and dismissed the indictment. Pet. App. 9a-14a. First, the court found that the Consent Orders that terminated the administrative proceeding and the indictment "involve the same conduct." *Id.* at 11a. It reasoned that the conduct prohibited by 12 U.S.C. 93(b) and 504, the statutes authorizing the Comptroller to assess monetary penalties, "necessarily encompasses the conduct which is the subject of 18 U.S.C. § 656," one of three statutes under which the defendants were indicted. Pet. App. 12a. On that basis, the court held that the administrative proceeding and the criminal indictment addressed the same offenses. *Id.* at 11a-12a.

The court then turned to the question whether the monetary sanctions were "solely remedial." The court noted that the Office of the Comptroller's policy and procedures manual states that a civil monetary penalty may serve as a "deterrent to similar violations by the persons against whom the penalties are assessed and by other banks and bankers" and that public disclosure of civil money penalties "may serve as a deterrent to future violations." Pet. App. 13a. In addition, the court observed that the Comptroller determined the amount of the monetary sanction imposed on each violator by using the Comptroller's "civil money penalty matrix," which looks to the violator's intent, number of violations, and efforts to

conceal the violations, but which does not list "injury to the government." *Ibid.* On that basis, the court concluded that the evidence did "not indicate that injury to the government was considered by the [Comptroller] in deciding the amount of the penalties to be imposed." *Id.* at 13a-14a. Although the court acknowledged that the Comptroller had incurred costs of $72,000 in investigating the offenses committed by petitioners, it found no evidence that the $44,000 assessed against petitioners was related to those costs. For those reasons, the court concluded that the "monetary assessments against [petitioners] were not solely remedial." *Id.* at 14a. "Assuming, *arguendo*, that these had some remedial purpose," the court explained, "the evidence establishes that they were at best partially designed to serve as a deterrent. Thus, the fines were punitive for double jeopardy purposes." *Ibid.*

5. The court of appeals reversed. Pet. App. 1a-8a. The court held that under *United States* v. *Halper*, 490 U.S. 435, 449-451 (1989), a civil assessment is not punishment "when it bears a rational relation to the goal of compensating the government for its loss." Pet. App. 4a. Here, the court held, "there was no gross disproportionality between the total fines imposed, $44,000, and the proven damages to the government, $72,000." *Ibid.* Accordingly, the court concluded, the administrative sanctions "can fairly be characterized as remedial." *Id.* at 6a (internal quotation marks omitted).

The court of appeals rejected the premise, on which the district court had relied, that the administrative assessments were punitive because of the "subjective intent" of the Comptroller to deter future violations. Instead, the court of appeals held that "the *Halper*

test 'constitutes an objective rule that is grounded in the nature of the sanction and the facts of the particular case. It does not authorize courts to undertake a broad inquiry into the subjective purposes that may be thought to lie behind a given judicial proceeding.'" *Ibid.* (quoting *Halper*, 490 U.S. at 453 (Kennedy, J., concurring)). The court noted its agreement with decisions of other courts of appeals that had permitted administrative fines to be justified as remedial in light of the government's investigatory costs, even when the agency had not considered those costs when imposing the penalty. Pet. App. 6a-8a (citing *United States* v. *Furlett*, 974 F.2d 839 (7th Cir. 1992); *United States* v. *WRW Corp.*, 986 F.2d 138 (6th Cir. 1993)).[1]

DISCUSSION

The court of appeals correctly rejected petitioners' claim (Pet. 10-15) that their criminal prosecutions must be dismissed because the monetary assessments previously imposed by the Comptroller of the Currency constitute "punishment" for the criminal offenses charged in the indictment. The circuits are divided, however, on the extent to which monetary penalties imposed as part of civil regulatory enforcement schemes trigger double jeopardy scrutiny. Because that issue is recurring and important, the Court should grant the petition to consider it.

1. In *United States* v. *Halper*, 490 U.S. 435 (1989), this Court held that after imposition of a criminal punishment, the Double Jeopardy Clause's "multiple punishments" prohibition barred imposition of a civil

[1] Because the court found that the Comptroller's sanctions were not "punishment," it declined to reach the government's argument that the civil assessments did not involve the "same offenses" as were charged in the indictment. Pet. App. 3a n.3.

penalty under the False Claims Act that was "so extreme and so divorced from the Government's damages and expenses as to constitute punishment." *Id.* at 442. The Court stressed that the government "is entitled to rough remedial justice, that is, it may demand compensation according to a somewhat imprecise formula * * * without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis." *Id.* at 446. *Halper* also cautioned that the Court was announcing "a rule for the rare case, such as the one before [it], where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Id.* at 449.

This Court's decisions since *Halper* have confirmed the limited reach of that decision. In *Department of Revenue* v. *Kurth Ranch*, 511 U.S. 767 (1994), the Court held that a nominally civil proceeding to collect a drug "tax" was inherently punitive in all applications, and thus was barred under the Double Jeopardy Clause because of the defendants' prior prosecution. *Id.* at 784. The Court nevertheless concluded that it would be "inappropriate" to extend *Halper*'s multiple-punishments analysis to "tax statutes[,] [which] serve a purpose quite different from civil penalties." *Ibid.*; see also *id.* at 785-787 (Rehnquist J., dissenting). Last Term, in *United States* v. *Ursery*, 116 S. Ct. 2135 (1996), the Court emphasized that *Halper* made no "sweeping change in the law" and did not "supplant" existing double jeopardy doctrine, but instead has a "narrow scope." *Id.* at 2146 n.2. The Court accordingly declined to extend *Halper*'s analysis to civil *in rem* forfeitures, which serve nonpunitive aims that are difficult to quantify. *Id.* at 2145-2146. At the same time, the Court rejected the

view that a civil sanction that is designed to deter misconduct necessarily constitutes "punishment" within the meaning of the Double Jeopardy Clause. See *Ursery*, 116 S. Ct. at 2145-2146 n.2, 2149; see also *Bennis* v. *Michigan*, 116 S. Ct. 994, 1000 (1996); *Kurth Ranch*, 511 U.S. at 779-780.

Petitioners take the broad view (Pet. 12-13) that whenever in personam monetary assessments are imposed "for the stated purpose of deterring alleged misconduct," and the government does not claim that it is a victim, the assessments are necessarily punitive for purposes of the Double Jeopardy Clause. That contention, however, overlooks this Court's recognition that "we long have held that this purpose [of deterrence] may serve civil as well as criminal goals," *Ursery*, 116 S. Ct. at 2149, and that "a deterrent purpose" may be "distinct from any punitive purpose," *Bennis*, 116 S. Ct. at 1000. That point applies with particular force to monetary sanctions, such as those employed here, that form part of the array of civil tools available to an agency to enforce a regulatory scheme. Furthermore, in contrast with petitioners' view that the recovery by the government of its costs of prosecution is inherently punitive (see Pet. 10-11), *Halper* itself made clear that the government's remedial ends "of course include[] not merely" the recovery of its direct pecuniary losses, "but also ancillary costs, such as the costs of detection and investigation." 490 U.S. at 445; see also *id.* at 442. The Court stated the point more generally in *Kurth Ranch*, where it noted that, in cases in which *Halper*'s analysis applies, "a so-called civil 'penalty' may be remedial in character if it merely reimburses the government for its actual costs arising from the defendant's criminal conduct." 511 U.S. at 777; see

also *id.* at 794 (O'Connor, J., dissenting) (noting that government may properly recover its costs of "detecting, investigating, and raiding [the defendants' drug] operation, the price of prosecuting them," and the cost of "incarcerating those who received prison sentences").[2]

2. The circuits are divided on the proper analysis of civil monetary penalties in the regulatory setting. In *S.A. Healy Co.* v. *OSHRC*, 96 F.3d 906 (7th Cir. 1996), petition for cert. pending (filed Feb. 14, 1997), the Secretary of Labor sought to assess civil penalties for multiple violations of the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. 651 *et seq.*, that resulted in three deaths. The Seventh Circuit ruled, however, that collection of the penalties was barred by the Double Jeopardy Clause, because the defendant previously had been criminally convicted on three misdeameanor counts under OSHA in connection with the same events. 96 F.3d at 910-911.

The Seventh Circuit concluded in *Healy* that administrative monetary sanctions assessed as a result of a defendant's non-compliance with work safety standards categorically constitute "punishment" for purposes of the Double Jeopardy Clause, even when they reasonably compensate the government for its

---

[2] That point is also reflected in this Court's cases before *Halper*. See, *e.g.*, *Helvering* v. *Mitchell*, 303 U.S. 391, 401 (1938) (penalty for fraudulent avoidance of a tax found remedial because the penalty is provided "for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud"); *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237 (1972) (forfeiture provision found remedial in part because it "serves to reimburse the Government for investigation and enforcement expenses").

costs of investigation and prosecution in the particular case. In so doing, that court stated that it disagreed with the contrary conclusions reached by the Tenth Circuit in this case and by the Sixth Circuit in *United States* v. *WRW Corp.*, 986 F.2d 138 (1993). See *Healy*, 96 F.3d at 910-911. The court also departed from its prior analysis in *United States* v. *Furlett*, 974 F.2d 839 (1992), on which the Tenth Circuit had relied in this case. The Seventh Circuit's analysis was based on its view that *Halper* teaches that "general and specific deterrence" are objects solely of the criminal law, see 96 F.3d at 910; see also *id.* at 911 ("A penalty designed to deter wrongdoing is punishment"), and its further view that *Ursery* "shows that *Halper* displaced older approaches [to double jeopardy analysis] and is now the point of reference for the inferior courts." *Id.* at 910.

Under *Healy*, and in contrast to the approach taken by the Sixth and Tenth Circuits, it would appear that many civil money penalties imposed when the government is not a victim of an offense (*i.e.*, when the government is acting as regulator) would be deemed to constitute "punishment" for double jeopardy purposes. Recognizing that it had created a circuit conflict, the panel in *Healy* circulated the opinion to all active judges on the Seventh Circuit. A majority did not call for rehearing en banc.[3] See 96 F.3d at 911 n.* (noting that Judges Flaum, Ripple, and Rovner had voted to hear the case en banc).

[3] On February 14, 1997, we filed a petition for certiorari in *Healy* asking the Court to hold that petition pending its consideration and disposition of the petition in this case. We are providing a copy of our petition in *Healy* to petitioners in this case.

3. The circuit conflict warrants this Court's resolution. Many federal agencies are authorized to seek civil money penalties for regulatory violations, and such proceedings are often pursued in tandem with referrals for criminal prosecution based on the same underlying conduct. The disagreement in the lower courts on the proper double jeopardy analysis creates uncertainty about how such parallel proceedings should be pursued. Review of this case would permit the Court to provide guidance on proper approaches to the double-jeopardy "punishment" question when an agency imposes civil money penalties to further regulatory aims. This case may also provide the Court with an opportunity to decide the question, which it has now twice left open, see *Ursery*, 116 S. Ct. at 2140 n.1; *Kurth Ranch*, 511 U.S. at 781 n.21, and which the court of appeals decided against the government in this case, see Pet. App. 75a, of the extent to which a purportedly punitive civil sanction may ever bar a subsequent criminal prosecution or punishment.[4] It

[4] As we argued in *Ursery*, see 116 S. Ct. at 2140 n.1, the "multiple punishments" doctrine of double jeopardy law is essentially a rule that protects a defendant's legitimate expectation of finality in a *criminal* judgment and sentence, and may not properly be invoked by a defendant who merely claims that he was previously subjected to a punitive *civil* sanction. Indeed, even when the defendant previously has been criminally prosecuted, this Court's cases do not support the claim that the multiple punishments doctrine may be invoked to preclude entirely a subsequent proceeding. *Halper* itself suggested that a second sanction would be barred only to the extent that it was punitive, 490 U.S. at 449-450, 452, and this Court's cases support the proposition that double jeopardy violations, like other constitutional violations, must be remedied only to the extent of the injury suffered. See, *e.g.*, *Jones* v.

may also provide a vehicle for further guidance on the proper application of *Blockburger* v. *United States*, 284 U.S. 299 (1932), in ascertaining whether the criminal and civil "offenses" are the "same" for double jeopardy purposes.[5]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
MARK M. RICHARD
Acting Assistant Attorney General
J. DOUGLAS WILSON
Attorney

FEBRUARY 1997

Thomas, 491 U.S. 376, 380-387 (1989); *Morris* v. *Mathews*, 475 U.S. 237, 244-247 (1986).

[5] Under the *Blockburger* "elements" test, the banking violations that formed the basis for the sanctions assessed against petitioners are not "the same" as the offenses charged in the indictment—conspiracy, misapplication of bank funds, and making false entries. Each of the criminal offenses requires proof of (at least) one element not required by the civil charges, and vice versa.

(4)

No. 96-976

Supreme Court, U.S.
FILED
JUN 25 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JOHN HUDSON, LARRY BARESEL,
and JACK BUTLER RACKLEY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

JOINT APPENDIX

JACK L. NEVILLE, JR.
BERNARD J. ROTHBAUM *
LINN & NEVILLE, P.C.
1200 Bank of Oklahoma Plaza
201 Robert S. Kerr Avenue
Oklahoma City, OK 73102-4289
(405) 239-6781

LAWRENCE S. ROBBINS
MAYER, BROWN & PLATT
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

C. MERLE GILE
2200 N. Classen Boulevard
2000 Citizen's Tower
Oklahoma City, OK 73106

JAMES A. ROLFE
2821 Routh Street
Dallas, TX 75201

LYNN PRINGLE
PRINGLE & PRINGLE
4101 N. Classen Boulevard
Oklahoma City, OK 73118
Counsel for Petitioners

WALTER DELLINGER
Acting Solicitor General
United States Department of Justice
950 Pennsylvania Ave. N.W.,
Room 5614
Washington, D.C. 20530-0001
(202) 514-2217
Counsel for Respondent

* Counsel of Record

PETITION FOR CERTIORARI FILED DECEMBER 17, 1996
CERTIORARI GRANTED APRIL 14, 1997

63 1pp

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NOTICE

The following items have been omitted in printing this Joint Appendix because they appear on the following pages in the printed Appendix to the Petition for a Writ of Certiorari:

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A.	Opinion of the United States Court of Appeals for the Tenth Circuit, Filed August 8, 1996	1a
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C.	Order of the United States District Court for the Western District of Oklahoma Staying Proceedings Pending Disposition of Petition for Writ of Certiorari, Filed November 5, 1996	15a
D.	Order of the United States Court of Appeals for the Tenth Circuit Denying Rehearing, Entered September 20, 1996	18a

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K.	Notice of Intention to Prohibit Further Participation Directed to Jack B. Rackley, Dated August 31, 1989	119a
L.	Stipulation and Consent Order Signed by John Hudson on October 26, 1989	129a
M.	Stipulation and Consent Order Signed by Jack Rackley on October 25, 1989	134a
N.	Stipulation and Consent Order Signed by Larry Baresel on October 24, 1989	139a

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 92-CR-152-ALL

UNITED STATES OF AMERICA,
Plaintiffs,

v.

JOHN HUDSON, *et al.*,
Defendants.

RELEVANT DOCKET ENTRIES

Date	No.	PROCEEDINGS
1/29/93	59	MOTION by defendant Larry Baresel to dismiss indictment on grounds of double jeopardy and motion to adopt co-dft's plea of double jeopardy (hm) [Entry date 02/01/93]
1/29/93	60	BRIEF IN SUPPORT by defendant Larry Baresel regarding mtn to dismiss indictment on grounds of double jeopardy and motion to adopt co-dft's plea of double jeopardy [59-1] (hm) [Entry date 02/01/93]
1/29/93	61	MOTION by defendant John Hudson to dismiss indictment on grounds of double jeopardy (hm) [Entry date 02/01/93]
1/29/93	62	BRIEF IN SUPPORT by defendant John Hudson regarding mnt to dismiss indictment on grounds of double jeopardy [61-1] (hm) [Entry date 02/01/93]
1/29/93	63	MOTION by defendant Jack Butler Rackley to dismiss indictment on grounds of double jeopardy (hm) [Entry date 02/01/93]

Date	No.	PROCEEDINGS
2/16/93	74	CONSOLIDATED RESPONSE by plaintiff USA to motion by defendant Jack Butler Rackley to dismiss indictment on grounds of double jeopardy [63-1], motion by defendant John Hudson to dismiss indictment on grounds of double jeopardy [61-1], motion by defendant Larry Baresel to dismiss indictment on grounds of double jeopardy and motion to adopt co-dft's plea of double jeopardy [59-1] (hm) [Entry date 02/17/93]
3/25/93	84	ORDER by Honorable Ralph G. Thompson denying motion by defendant Jack Butler Rackley to dismiss indictment on grounds of double jeopardy [63-1], denying motion by defendant John Hudson to dismiss indictment on grounds of double jeopardy [61-1], denying motion by defendant Larry Baresel to dismiss indictment on grounds of double jeopardy and motion to adopt co-dft's plea of double jeopardy [59-1] (cc: all counsel) (hm) [Entry date 03/26/93]
3/30/93	86	NOTICE OF APPEAL by defendant John Hudson from Dist. Court decision (cc: all counsel), order entered 3-25-93-n/s (sa) [Entry date 03/30/93]
3/30/93	88	NOTICE OF APPEAL by defendant Larry Baresel from Dist. Court decision (cc: all counsel), order entered 3-25-93 w/s CCA #93-6123 (sa) [Entry date 03/31/93] [Edit date 04/12/93]
3/31/93	90	NOTICE OF APPEAL by defendant Jack Butler Rackley from Dist. Court decision (cc: all counsel), order entered 3-25-93-w/s (CCA #93-6125) (sa) [Entry date 04/02/93] [Edit date 04/12/93]

Date	No.	PROCEEDINGS
3/22/94	106	ENTER ORDER by Honorable Ralph G. Thompson: An evidentiary hrg on the issue of money sanctions, pursuant to the mandate issued March 10, 1994 by the US Ct of Appeal for the Tenth Circuit is hereby scheduled for 9:30 am on Thursday, April 7, 1994 before the Honorable Ralph G. Thompson, US District Judge, Courtroom #4 re [105-1], re [104-1], re [103-1] evidentiary hearing Thursday, 4/7/94 9:30 am (cc: all counsel) (hm) [Entry date 03/23/94]
4/18/94	—	TRANSCRIPT of Evidentiary Hearing on Money Sanctions Issue held on April 7, 1994 by CSR Larry E. Marks (hm) [Entry date 04/20/94]
12/16/94	121	ORDER by Honorable Ralph G. Thompson dismissing counts as to John Hudson, Larry Baresel, Jack Butler Rackley, John Hudson (1) count(s) 1, 2-22. The indictments would subject defendant to double jeopardy, and the indictment is dismissed, Larry Baresel (2) count(s), 1, 2, 4-7, 9-13, 16, 18, 20-22. The indictments would subject the defendants to double jeopardy, and the indictment is dismissed, Larry Baresel (2) count(s) 1, 2, 4-7, 9-13, 16, 18, 20-22. The indictments would subject the defendants to double jeopardy, and the indictment is dismissed, Jack Butler Rackley (3) count(s) 1, 2, 4-7, 8, 9-10, 12-18, 19, 20-22. The indictments would subject defendants to double jeopardy, the indictment is dismissed party John Hudson, party Larry Baresel, party Jack Butler Rackley, case dismissed as to John Hudson, Larry Baresel, Jack Butler Rackley, John Hudson (1) count(s) 1, 2-22. The indictments would subject defendant to double jeopardy, and the

Date	No.	PROCEEDINGS
		indictment is dismissed, Larry Baresel (2) count(s) 1, 2, 4-7, 9-13, 16, 18, 20-22. The indictments would subject the defendants to double jeopardy, and the indictment is dismissed, Larry Baresel (2) count(s) 1, 2, 4-7, 9-13, 16, 18, 20-22. The indictments would subject the defendants to double jeopardy, and the indictment is dismissed, Larry Baresel (2) count(s) 1, 2, 4-7, 9-13, 16, 18, 20-22. The indictments would subject the defendants to double jeopardy, and the indictment is dismissed, Larry Baresel (2) count(s) 1, 2, 4-7, 9-13, 16, 18 ,20-22. The indictments would subject the defendants to double jeopardy, and the indictment is dismissed, Jack Butler Rackley (3) count(s) 1, 2, 4-7, 8, 9-10, 12-18, 19, 20-22. The indictments would subject defendants to double jeopardy, the indictment is dismissed (cc: all counsel) (bm) [Entry date 12/19/94]
1/12/95	122	NOTICE OF APPEAL by plaintiff USA from Dist. Court decision [121-3] order entered 12-16-94w/s (cc: all counsel) (sa) [Entry date 01/13/95]
10/3/96	128	CCA's cert cpy of judg & opin MANDATE (reversed, remanded) [122-1] (Tacha, Logan & Reavley) (#95-6030) (John Hudson, Larry Baresel & Jack B. Rackley) (sa) [Entry date 10/03/96]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 95-6030

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
JOHN HUDSON, *et al.*,
Defendants-Appellees.

RELEVANT DOCKET ENTRIES

Date	No.	PROCEEDINGS
11/16/95	27	[899742] Case argued and submitted to Judges Tacha, Logan, Reavley. (sls)
8/8/96	36	[964560] Terminated on the Merits after Oral Hearing; Reversed and Remanded; Written, Signed, Published. Tacha; Logan; Reavley, authoring judge. [95-6030] (dmc)
9/20/96	41	[974849] Order filed by Judge(s) Tacha, Logan, Reavley denying Petition for rehearing in banc [969482-1] (oac)
9/30/96	42	[976641] Mandate issued. Mandate receipt due 10/30/96 (dmc)
10/9/96	43	[979775] Mandate receipt filed. (dmc)
11/20/96	44	[987943] Case file closed. 11/20/98 (gra)
12/30/96	45	[997803] Petition for writ of certiorari filed on 12/17/96 by Appellant USA. Supreme Court Number 96-976. (pjs)
4/18/97	46	[1027491] Supreme Court order dated 4/14/97 granting certiorari filed. (pjs)

[Filed Aug. 25, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CR 92-152 T

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

JOHN HUDSON,
LARRY BARESEL, and
JACK BUTLER RACKLEY,
Defendants.

Violation: 18 USC § 371
18 USC § 656
18 USC § 2
18 USC § 1005

INDICTMENT

The Federal Grand Jury charges:

I. INTRODUCTION

AT ALL TIMES MATERIAL TO THIS INDICTMENT:

1. The Office of the Comptroller of the Currency (OCC) was an agency of the United States established to charter, supervise and regulate national banks.

2. The Federal Deposit Insurance Corporation (FDIC) was an agency of the United States established to protect depositors by insuring deposits in insured banking institutions.

3. As part of its regulatory function, the FDIC was empowered to examine member banks to insure, among other things, that loans were adequately supported by collateral or financial statements; that the bank was not loaning too much money, compared to the bank's size, to any particular customer; and that the bank was not engaged in any other unsound banking practices which might expose the bank to a risk of substantial loss.

THE FINANCIAL INSTITUTIONS

4. The First National Bank, Tipton, Oklahoma, (Tipton) was a nationally-chartered bank, the deposits of which were insured by the FDIC.

5. The First National Bank, Hammon, Oklahoma, (Hammon) was a nationally-chartered bank, the deposits of which were insured by the FDIC.

6. The First State Bank, Blanchard, Oklahoma, (Blanchard) was a state-chartered bank, the deposits of which were insured by the FDIC.

7. The First State Bank, Willow, Oklahoma (Willow) was a state-chartered bank, the deposits of which were insured by the FDIC.

8. The Bank of Granite, Granite, Oklahoma, (Granite), was a state-chartered bank, the deposits of which were insured by the FDIC.

9. The First National Bank of Del City, Oklahoma, (Del City) was a nationally-chartered bank, the deposits of which were insured by the FDIC.

10. MBank, Dallas, Texas (MBank) was a nationally-chartered bank, the deposits of which were insured by the FDIC.

THE DEFENDANTS

11. JOHN HUDSON was an attorney licensed to practice law in the State of Oklahoma. HUDSON, either individually or through various holding companies, was

also the majority owner of Tipton, Hammon, Blanchard, Willow, and Granite banks (collectively referred to in this Indictment as "the HUDSON banks").

12. LARRY BARESEL was an attorney licensed to practice law in the State of Oklahoma, and was JOHN HUDSON's law partner. BARESEL was a member of the Tipton Board of Directors from October 1986 until September 1987, and was a member of the Hammon Board of Directors from January 1986 until September 1987.

13. JACK BUTLER RACKLEY was the president and chairman of the Board of Directors of Tipton Bank from October 1986 until September 1987; was a member of the Board of Directors of Hammon Bank from October 1986 until September 1987; and was a member of the Board of Directors at Blanchard Bank from January 1987 until August 1987. JACK BUTLER RACKLEY was also president of Executive Bank Management Services, Inc., a bank consulting company owned by HUDSON.

BUSINESS ENTITIES OF DEFENDANTS

14. SKL, Incorporated, (SKL), was an Oklahoma corporation, whose officers included Norval John Shelton III, BARESEL's brother-in-law; Roberta Shelton, BARESEL's mother-in-law; and Sharon Matthews, HUDSON and BARESEL's secretary. Sharon Matthews was also known as Sharon Cook and Sharon Gary.

15. Executive Bank Management Services, Incorporated, (EBMS), was an Oklahoma corporation in which HUDSON was sole stockholder, and which was formed to provide services to the HUDSON banks.

16. DMS Realty Advisers, Incorporated, (DMS), was an Oklahoma corporation of which LARRY BARESEL was president.

17. Macao Investment Company, Incorporated, (Macao), was an Oklahoma corporation of which HUDSON

was the sole stockholder. In December, 1986, HUDSON transferred all interest in Macao to SKL.

COUNT 1

CONSPIRACY
[18 U.S.C. § 371]

18. Paragraphs 1 through 17 of the Introduction to this Indictment are realleged and incorporated as though fully set forth herein.

19. From in or about January, 1986, and continuing through in or about September, 1987, the exact dates being unknown to the Grand Jury, within the Western District of Oklahoma,

JOHN HUDSON,
LARRY BARESEL, and
JACK BUTLER RACKLEY,

the defendants herein, did willfully, unlawfully and knowingly combine, conspire, confederate and agree together to commit offenses against the United States, that is:

A. To willfully misapply and cause to be misapplied money of federally-insured banks, while being an officer, director, agent or employee of, or connected in any capacity with such banks, in violation of Title 18, United States Code, Section 656;

B. To make and cause to be made false entries in bank books, reports, or statements with intent to defraud and deceive the HUDSON banks, MBank, the OCC, and the FDIC, in violation of Title 18, United States Code, Section 1005.

I. PURPOSE OF THE CONSPIRACY

20. The purpose of the conspiracy was to fraudulently obtain money from the HUDSON banks through the use of nominee loans, so as to disguise HUDSON's involve-

ment; to use the proceeds of these fraudulent loans to benefit HUDSON by reducing the amount of HUDSON's indebtedness to MBank; to transfer the remaining debt to a HUDSON-controlled creditor, so that HUDSON could maintain control of the HUDSON banks; and to conceal the true nature of the loan transactions from the HUDSON banks, MBank, the OCC, and the FDIC.

II. MANNER AND MEANS OF THE CONSPIRACY

21. In order to finance his purpose of the HUDSON banks, HUDSON borrowed approximately $7.5 million, and at all times relevant to this Indictment, these promissory notes were held by MBank (these notes will be referred to in this Indictment as "the MBank notes"). The collateral for these notes included the stock in the HUDSON banks.

22. As HUDSON's creditor, MBank would periodically examine the financial condition of the HUDSON banks to guard against unsound banking practices which might adversely affect the value of its collateral.

23. In 1986, MBank's examinations of the HUDSON banks revealed unsound banking practices, which seriously undermined the financial condition of the banks and which placed MBank at a risk of substantial loss. As a result of this risk, MBank began efforts to sell the MBank notes so as to minimize the potential loss.

24. It was a part of the conspiracy that HUDSON began his own search for a person who would purchase the MBank notes at a discount, and who would transfer these notes back to a HUDSON-controlled corporation, thus allowing HUDSON to become his own creditor, maintain control over the HUDSON banks, and substantially reduce his debt at MBank.

25. It was further a part of the conspiracy that JOHN HUDSON recruited Claud Cypert to purchase the MBank notes.

26. It was further a part of the conspiracy that HUDSON, BARESEL, and RACKLEY, in order to provide Cypert with enough money to purchase the MBank notes, made and caused to be made fraudulent loans totalling $1.15 million from three of the HUDSON banks, and obtained loans at First National Bank of Del City. These loans were made in two ways:

A. JOHN HUDSON and LARRY BARESEL would recruit, or cause to be recruited, nominee borrowers. A nominee borrower is a person or corporation whose name is used for the purpose of obtaining a bank loan, when the proceeds are actually used for the benefit of another.

B. LARRY BARESEL would persuade persons or corporations to borrow funds from a HUDSON bank for the purpose of investing in SKL, while knowing that the proceed of these loans were to be used for HUDSON's benefit.

27. It was further a part of the conspiracy that HUDSON and BARESEL would assure the borrowers that one of the HUDSON banks would provide financing, and that the borrowers would not be required to go to the lending bank or provide any collateral for the loans.

28. It was further a part of the conspiracy that JOHN HUDSON, although no longer a board member, would use his position and influence as principal owner of the HUDSON banks to cause these loans to be approved and funded, regardless of the borrower's credit-worthiness or ability to repay the loans.

29. It was further a part of the conspiracy that JACK BUTLER RACKLEY used his positions at the HUDSON banks and EBMS to cause loan documents to be prepared, loans to be made, and funds to be disbursed.

30. It was further a part of the conspiracy that JOHN HUDSON, LARRY BARESEL, and JACK BUTLER

RACKLEY attempted to conceal from the HUDSON banks, MBank, the OCC, and the FDIC the fact that HUDSON was the ultimate beneficiary of the loan proceeds. These efforts to conceal included, among others:

A. Causing SKL debentures to be issued to those borrowers who believed they were investing in SKL, knowing that the funds were to be used for HUDSON'S benefit.

B. Making, or causing to be made, false entries in bank documents to disguise HUDSON's interest in the loan proceeds, and the true purpose for which the loan proceeds were used;

C. Requesting that bank officials hide loan documents to keep regulators from discovering HUDSON's interest in the loans;

D. Transferring, or causing to be transferred, the proceeds of the nominee loans through various bank accounts, including the SKL account, so that HUDSON did not appear to be the recipient of loan proceeds.

31. It was further a part of the conspiracy that JOHN HUDSON and LARRY BARESEL caused these nominee loan proceeds to be given to Claud Cypert, who then used these funds to purchase the MBank notes.

32. It was further a part of the conspiracy that BARESEL instructed Claud Cypert to transfer ownership of the MBank notes he had purchased to Macao Investment Company.

III. OVERT ACTS

In order to achieve the objects of the conspiracy, the defendants committed and caused to be committed the following overt acts, among others, in the Western District of Oklahoma:

33. On or about the dates listed below, HUDSON, BARESEL, and RACKLEY disbursed funds or made

nominee loans, or caused them to be made, to the borrowers and in the amounts listed below:

DATE	*BANK*	*BORROWER*	*AMOUNT*
12-29-86	Tipton	SKL, Inc.	$ 90,000
12-29-86	Blanchard	SKL, Inc.	100,000
12-29-86	Tipton	JACK BUTLER RACKLEY	20,000
12-30-86	Tipton	SKL, Inc.	100,000
12-30-86	Tipton	Hurley Financial	100,000
12-31-86	Hammon	JACK BUTLER RACKLEY	90,000
12-31-86	Hammon	SKL	90,000
12-31-86	Hammon	Hurley Financial	60,000

34. A. In the fall of 1986, BARESEL contacted Barry Neal Hurley and persuaded him to invest in SKL, telling Hurley that one of the HUDSON banks would finance the investment.

B. In December, 1986, at a meeting at HUDSON and MARESEL's law office, RACKLEY gave Hurley a $100,000 cashier's check drawn on Tipton, after Hurley signed a blank note.

C. RACKLEY instructed Hurley to exchange this cashier's check for a cashier's check payable to SKL and deliver this cashier's check to BARESEL.

35. In December, 1986, RACKLEY prepared two cashier's checks drawn on Tipton, one payable to SKL for $100,000, the other payable to Hurley Financial for $100,000.

36. Upon the funding of each loan or disbursement listed in paragraph 33, HUDSON and BARESEL deposited the proceeds, or caused them to be deposited, into SKL's bank account.

37. On December 30, 1986, HUDSON and BARESEL caused a check in the amount of $400,000 to be drawn on SKL's account, payable to Macao.

38. On December 30, 1986, HUDSON and BARESEL caused this check to be used to purchase a $400,000

cashier's check payable to Claud Cypert, showing Macao as remitter (the purchaser) of the cashier's check.

39. On December 30, 1986, BARESEL gave this cashier's check to Claud Cypert and instructed Cypert to exchange it for another cashier's check in the same amount, made payable to MBank, showing Cypert as remitter.

40. On or about December 30, 1986, BARESEL accompanied Cypert to MBank, where the MBank notes secured by the stock in the Hammon and Tipton banks were sold to Cypert for $400,000.

41. Immediately thereafter, BARESEL instructed Cypert to assign these notes to Macao.

42. On or about the dates listed below, HUDSON, BARESEL, and RACKLEY made nominee loans, or caused them to be made, to the borrowers and in the amounts listed below:

DATE	*BANK*	*BORROWER*	*AMOUNT*
2-20-87	Tipton	Claud Cypert	$ 90,000
2-20-87	Hammon	Claud Cypert	90,000
2-23-87	Tipton	Tom Lucas	60,000
2-24-87	Del City	SKL	70,000
2-24-87	Tipton	Jack Marshall	93,000
2-24-87	Hammon	Jack Marshall	92,000
2-25-87	Tipton	David Tuck	30,000
2-25-87	Hammon	David Tuck	20,000
2-25-87	Tipton	Hal Clifford	50,000
2-26-87	Blanchard	JACK BUTLER RACKLEY	60,000
2-26-87	Blanchard	Partridge Capital Corp	100,000
2-26-87	Blanchard	Tom Lucas	40,000
2-27-87	Hammon	Sharon Matthews	10,000

43. A. On or about February 19, 1987, HUDSON asked David Tuck to sign blank loan documents which HUDSON stated were to renew earlier

loans, but which were actually used to fund new loans at Hammon and Tipton.

B. On or about February 25, 1987, RACKLEY approved these two loans and caused them to be funded.

C. Thereafter, RACKLEY caused cashier's checks totaling $50,000 to be drawn on Hammon and Tipton, payable to DMS, showing David Tuck as remitter.

D. On February 27, 1987, BARESEL endorsed these two cashier's checks as president of DMS.

E. BARESEL then caused a cashier's check to be purchased with the cashier's checks described in paragraph 43(C), in the amount of $50,000, payable to SKL, showing DMS as remitter.

4. A. In February, 1987, BARESEL contacted Tom Lucas and persuaded him to invest in SKL and assured him that a HUDSON bank would finance the investment, despite Lucas' inability to repay the loans.

B. BARESEL then had Lucas sign two notes and provided him with two cashier's checks totaling $100,000, drawn on Blanchard and Tipton.

C. BARESEL then instructed Lucas to deposit the checks into Lucas' bank account at Bank of the Northwest in Woodward, Oklahoma, and to then purchase a cashier's check at Bank of the Northwest payable to SKL.

D. Thereafter, BARESEL met Lucas in Watonga, Oklahoma, where Lucas delivered to BARESEL the cashier's check payable to SKL.

45. A. In February, 1987, HUDSON requested that Ronald Collier, president of First National Bank in Del City, loan money to HUDSON using SKL, BARESEL, and EBMS as nominees.

B. HUDSON gave Collier his personal guaranty for the loans, but asked Collier to keep these guaranty documents out of the loan file so that regulators would not learn of HUDSON's interest in the loan proceeds.

46. Upon the funding of the loans listed in paragraph 42, with the exception of the two loans to Claud Cypert and the loan to Hal Clifford, HUDSON and BARESEL caused the loan proceeds to be deposited into SKL's bank account.

47. In February, 1987, BARESEL told Cypert that Macao was short of funds to complete the purchase of the notes on Willow and Granite, and asked Cypert to borrow enough funds to make up the deficit.

48. On February 20, 1987, RACKLEY approved and caused to be funded loans to Cypert from Hammon and Tipton, totalling $180,000.

49. On February 26, 1987, HUDSON and BARESEL caused a $520,000 check to be drawn on SKL's account, payable to Macao.

50. A. On February 26, 1987, HUDSON and BARESEL caused a $50,000 check written by Hal Clifford, representing the proceeds of his loan, to be deposited into the EBMS bank account.

B. On February 26, 1987, HUDSON and BARESEL caused EBMS to purchase a cashier's check in the amount of $50,000, payable to Macao Investments. This cashier's check, together with the check described in paragraph 49, were used to purchase a cashier's check for $570,000, payable to Claud Cypert, showing Macao Investment Company as remitter.

51. In February, 1987, BARESEL gave Cypert the $570,000 cashier's check described in paragraph 50(B), and instructed him to exchange this check and the two

loan proceeds checks described in paragraph 48 for a single cashier's check for $750,000, payable to MBank, showing Cypert as remitter.

52. On February 27, 1987, BARESEL accompanied Cypert to MBank, where the MBank notes secured by the stock in the Willow and Granite banks were sold to Cypert.

53. In addition, the Grand Jury incorporates by reference as additional overt acts the allegations contained in Counts 2 through 22 of this Indictment, as though fully set forth herein.

All in violation of Title 18, United States Code, Section 371.

COUNT 2

MISAPPLICATION OF FUNDS
[18 U.S.C. § 656 & § 2]

1. Paragraphs 1 through 17 of the Introduction to this Indictment are realleged and incorporated as though fully set forth herein.

2. On or about December 29, 1986, in the Western District of Oklahoma,

JOHN HUDSON,
LARRY BARESEL, and
JACK BUTLER RACKLEY,

the defendants herein, being connected with the First National Bank, Tipton, Oklahoma: JOHN HUDSON as principal owner, LARRY BARESEL as a member of the Board of Directors, and JACK BUTLER RACKLEY as president and member of the Board of Directors of said bank, with the intent to injure and defraud the First National Bank, Tipton, did willfully misapply and cause to be misapplied monies, funds and credits belonging to and intrusted to the care of First National Bank, Tipton, in an amount in excess of $100.

3. In particular, the defendants:

A. Made and caused to be made a nominee loan to SKL in the amount of $90,000;

B. Caused the promissory note to falsely state that the loan was for SKL's "business investments" while knowing that the loan proceeds were to be used for HUDSON'S benefit;

C. Intentionally failed to disclose HUDSON'S interest in the loan proceeds in any book or record of First National Bank, Tipton, causing $90,000 to be disbursed under a record which misrepresented the true nature of the loan transaction.

All in violation of Title 18, United States Code, Sections 656 and 2.

COUNT 3

MISAPPLICATION OF FUNDS
[18 U.S.C. § 656 & § 2]

1. Paragraphs 1 through 17 of the Introduction to this Indictment are realleged and incorporated as though fully set forth herein.

2. On or about December 29, 1986, in the Western District of Oklahoma,

JOHN HUDSON,

the defendant herein, being connected with the First State Bank, Blanchard, Oklahoma, as principal owner, with the intent to injure and defraud First State Bank, Blanchard, did willfully misapply and cause to be misapplied monies, funds and credits belonging to and intrusted to the care of First State Bank, Blanchard, in an amount in excess of $100.

3. In particular, the defendant:

A. Made and caused to be made a nominee loan to SKL in the amount of $100,000;

B. Caused the promissory note to falsely state that the loan was for SKL's "business," while knowing that the loan proceeds were to be used for HUDSON'S benefit;

C. Intentionally failed to disclose HUDSON'S interest in the loan proceeds in any book or record of First State Bank, Blanchard, causing $100,000 to be disbursed under a record which misrepresented the true nature of the loan transaction.

All in violation of Title 18, United States Code, Sections 656 and 2.

COUNT 4

MISAPPLICATION OF FUNDS
[18 U.S.C. § 656 & § 2]

1. Paragraphs 1 through 17 of the Introduction to this Indictment are realleged and incorporated as though fully set forth herein.

2. On or about December 30, 1986, in the Western District of Oklahoma,

JOHN HUDSON,
LARRY BARESEL, and
JACK BUTLER RACKLEY,

the defendants herein, being connected with the First National Bank, Tipton, Oklahoma: JOHN HUDSON as principal owner, LARRY BARESEL as a member of the Board of Directors, and JACK BUTLER RACKLEY as president and member of the Board of Directors of said bank, with the intent to injure and defraud the First National Bank, Tipton, did willfully misapply and cause to be misapplied monies, funds and credits belonging to and intrusted to the care of First National Bank, Tipton, in an amount in excess of $100.

3. In particular, the defendants:

A. Prepared and caused to be prepared a cashier's check in the amount of $100,000, payable to SKL;

B. Caused the cashier's check to falsely state that it represented loan proceeds, although in fact no such loan to SKL had been made, and knowing that the proceeds of this cashier's check were to be used for HUDSON'S benefit;

C. Intentionally failed to disclose HUDSON'S interest in the proceeds of this cashier's check in any book or record of First National Bank, Tipton, causing $100,000 to be disbursed under a record which misrepresented the true nature of the transaction.

All in violation of Title 18, United States Code, Sections 656 and 2.

COUNT 5

MISAPPLICATION OF FUNDS
[18 U.S.C. § 656 & § 2]

1. Paragraphs 1 through 17 of the Introduction to the Indictment are realleged and incorporated as though fully set forth herein.

2. On or about December 30, 1986, in the Western District of Oklahoma,

JOHN HUDSON,
LARRY BARESEL, and
JACK BUTLER RACKLEY,

the defendants herein, being connected with the First National Bank, Tipton, Oklahoma: JOHN HUDSON as principal owner, LARRY BARESEL as a member of the Board of Directors, and JACK BUTLER RACKLEY as president and member of the Board of Directors of said bank, with the intent to injure and defraud the First National Bank, Tipton, did willfully misapply and cause to be misapplied monies, funds and credits belonging to and

intrusted to the care of First National Bank, Tipton, in an amount in excess of $100.

3. In particular, the defendants:

A. Prepared and caused to be prepared a cashier's check in the amount of $100,000, payable to Hurley Financial Corporation;

B. Caused the cashier's check to falsely state that it represented loan proceeds, although in fact no such loan to Hurley Financial Corporation had been made, and knowing that the proceeds of this cashier's check were to be used for HUDSON'S benefit;

C. Intentionally failed to disclose HUDSON'S interest in the proceeds of this cashier's check in any book or record of First National Bank, Tipton, causing $100,000 to be disbursed under a record which misrepresented the true nature of the transaction.

All in violation of Title 18, United States Code, Sections 656 and 2.

COUNT 6

MISAPPLICATION OF FUNDS
[18 U.S.C. § 656 & § 2]

1. Paragraphs 1 through 17 of the Introduction to this Indictment are realleged and incorporated as though fully set forth herein.

2. On or about December 29, 1986, in the Western District of Oklahoma,

JOHN HUDSON,
LARRY BARESEL, and
JACK BUTLER RACKLEY,

the defendants herein, being connected with the First National Bank, Tipton, Oklahoma: JOHN HUDSON as principal owner, LARRY BARESEL as a member of the Board of Directors, and JACK BUTLER RACKLEY, as

president and member of the Board of Directors of said bank, with the intent to injure and defraud the First National Bank, Tipton, did willfully misapply and cause to be misapplied monies, funds and credits belonging to and intrusted to the care of First National Bank, Tipton, in an amount in excess of $100.

3. In particular, the defendants:

A. Made and caused to be made a nominee loan to RACKLEY in the amount of $20,000;

B. Caused the promissory note to falsely state that the loan was for "business investment" by RACKLEY, while knowing that the loan proceeds were to be used for HUDSON'S benefit;

C. Intentionally failed to disclose HUDSON'S interest in the loan proceds in any book or record of First National Bank, Tipton, causing $20,000 to be disbursed under a record which misrepresented the true nature of the loan transaction.

All in violation of Title 18, United States Code, Sections 656 and 2.

COUNT 7

MISAPPLICATION OF FUNDS
[18 U.S.C. § 656 & § 2]

1. Paragraphs 1 through 17 of this Indictment are realleged and incorporated as though fully set forth herein.

2. On or about December 29, 1986, in the Western District of Oklahoma,

JOHN HUDSON,
LARRY BARESEL, and
JACK BUTLER RACKLEY,

the defendants herein, being connected with the First National Bank, Hammon, Oklahoma: JOHN HUDSON as principal owner, LARRY BARESEL as a member of the

Board of Directors, and JACK BUTLER RACKLEY as member of the Board of Directors of said bank, with the intent to injure and defraud the First National Bank, Hammon, did willfully misapply and cause to be misapplied monies, funds and credits belonging to and intrusted to the care of First National Bank, Hammon, in an amount in excess of $100.

3. In particular, the defendants:

A. Made and caused to be made a nominee loan to RACKLEY in the amount of $90,000;

B. Caused the promissory note to falsely state that the loan was for "business and real estate investment" by RACKLEY, while knowing that the loan proceeds were to be used for HUDSON'S benefit;

C. Intentionally failed to disclose HUDSON'S interest in the loan proceeds in any book or record of First National Bank, Hammon, causing $90,000 to be disbursed under a record which misrepresented the true nature of the loan transaction.

All in violation of Title 18, United States Code, Sections 656 and 2.

COUNT 8

FALSE ENTRY IN BANK RECORD
[18 U.S.C. § 1005]

1. Paragraphs 1 through 17 of this Indictment are realleged and incorporated as though fully set forth herein.

2. On or about November 26, 1986, in the Western District of Oklahoma,

JACK BUTLER RACKLEY,

the defendant herein, knowingly and with intent to deceive the directors of Tipton, the OCC, and the FDIC, caused a materially false entry to be made in the records of First National Bank, Tipton, Oklahoma, by falsely reporting to

the Board of Directors that he had borrowed $90,000 from the First National Bank, Hammon, for the purpose of making a real estate investment, when in truth and in fact, as RACKLEY well knew, the proceeds of this $90,000 were to be used for another purpose, that is, for HUDSON'S benefit.

All in violation of Title 18, United States Code, Section 1005.

COUNT 9

MISAPPLICATION OF FUNDS
[18 U.S.C. § 656 & § 2]

1. Paragraphs 1 through 17 of the Introduction to this Indictment are realleged and incorporated as though fully set forth herein.

2. On or about December 29, 1986, in the Western District of Oklahoma,

JOHN HUDSON,
LARRY BARESEL, and
JACK BUTLER RACKLEY,

the defendants herein, being connected with the First National Bank, Hammon, Oklahoma: JOHN HUDSON as principal owner, LARRY BARESEL as a member of the Board of Directors, and JACK BUTLER RACKLEY as member of the Board of Directors of said bank, with the intent to injure and defraud the First National Bank, Hammon, did willfully misapply and cause to be misapplied monies, funds and credits belonging to and intrusted to the care of First National Bank, Hammon, in an amount in excess of $100.

3. In particular, the defendants:

A. Made and caused to be made a nominee loan to SKL in the amount of $90,000;

B. Caused the promissory note to falsely state that the loan was for a "business and real estate

investment' by SKL, while knowing that the loan proceeds were to be used for HUDSON'S benefit;

C. Intentionaly failed to disclose HUDSON'S interest in the loan proceeds in any book or record of First National Bank, Hammon, causing $90,000 to be disbursed under a record which misrepresented the true nature of the loan transaction.

All in violation of Title 18, United States Code, Sections 656 and 2.

COUNT 10

MISAPPLICATION OF FUNDS
[18 U.S.C. § 656 & § 2]

1. Paragraphs 1 through 17 of the Introduction to this Indictment are realleged and incorporated as though fully set forth herein.

2. On or about December 29, 1986, in the Western District of Oklahoma,

JOHN HUDSON,
LARRY BARESEL, and
JACK BUTLER RACKLEY,

the defendants herein, being connected with the First National Bank, Hammon, Oklahoma: JOHN HUDSON as principal owner, LARRY BARESEL as a member of the Board of Directors, and JACK BUTLER RACKLEY as member of the Board of Directors of said bank, with the intent to injure and defraud the First National Bank, Hammon, did wilfully misapply and cause to be misapplied monies, funds and credits belonging to and intrusted to the care of First National Bank, Hammon, in an amount in excess of $100.

3. In particular, the defendants:

A. Made and caused to be made a nominee loan to Hurley Financial Corporation in the amount of $60,000;

B. Caused the promisory note to falsely state that the loan was for "business operations" of Hurley Financial, while knowing that the loan procedes were to be used for HUDSON'S benefit;

C. Intentionally failed to disclose HUDSON'S interest in the loan proceeds in any book or record of First National Bank, Hammon, causing $60,000 to be disbursed under a record which misrepresented the true nature of the loan transaction.

All in violation of Title 18, United States Code, Sections 656 and 2.

COUNT 11

MISAPPLICATION OF FUNDS
[18 U.S.C. §656 & § 2]

1. Paragraphs 1 through 17 of the Introduction to this Indictment are realleged and incorporated as though fully set forth herein.

2. On or about February 24, 1987, in the Western District of Oklahoma,

JOHN HUDSON and
LARRY BARESEL,

the defendants, aided and abetted Ronald L. Collier who was connected with the First National Bank of Del City, Del City, Oklahoma, as president of said bank, with the intent to injure and defraud the First National Bank of Del City, did procure the misapplication of monies, funds and credits belonging to and intrusted to the care of First National Bank of Del City in an amount in excess of $100.

3. In particular, the defendants:

A. HUDSON requested that a loan from First National Bank of Del City be made to him through SKL, BARESEL, and EBMS as nominee borrowers;

B. BARESEL signed a promissory note at First National Bank of Del City, knowing that the proceeds of the loan were to be used for HUDSON'S benefit;

C. Caused the loan documents to reflect that money was being loaned to SKL, knowing that the proceeds were actually to be used by HUDSON for his own benefit;

D. Requested that Collier intentionally fail to disclose HUDSON'S interest in the loan proceeds in any book or record of First National Bank of Del City, causing $70,000 to be disbursed to SKL under a record which misrepresented the true nature of the loan transaction.

All in violation of Title 18, United States Code, Sections 656 and 2.

COUNT 12

MISAPPLICATION OF FUNDS
[18 U.S.C. §656 & § 2]

1. Paragraphs 1 through 17 of the Introduction to this Indictment are realleged and incorporated as though fully set forth herein.

2. On or about February 24, 1987, in the Western District of Oklahoma,

JOHN HUDSON,
LARRY BARESEL, and
JACK BUTLER RACKLEY,

the defendants herein, being connected with the First National Bank, Tipton, Oklahoma: JOHN HUDSON as principal owner, LARRY BARESEL as a member of the Board of Directors, and JACK BUTLER RACKLEY as president and member of the Board of Directors of said bank, with the intent to injure and defraud the First National Bank, Tipton, did willfully misapply and cause to

be misapplied monies, funds and credits belonging to and intrusted to the care of First National Bank, Tipton, in an amount in excess of $100.

3. In particular, the defendants:

A. Made and caused to be made a nominee loan to Jack Marshall in the amount of $93,000;

B. Caused the promissory note to falsely state that the loan was for Jack Marshall's "business," while knowing that the loan proceeds were to be used for HUDSON'S benefit;

C. Intentionally failed to disclose HUDSON'S interest in the loan proceeds in any book or record of First National Bank, Tipton, causing $93,000 to be disbursed under a record which misrepresented the true nature of the loan transaction.

All in violation of Title 18, United States Code, Sections 656 and 2.

COUNT 13

MISAPPLICATION OF FUNDS
[18 U.S.C. § 656 & § 2]

1. Paragraphs 1 through 17 of the Introduction to this indictment are realleged and incorporated as though fully set forth herein.

2. On or about February 24, 1987, in the Western District of Oklahoma,

JOHN HUDSON,
LARRY BARESEL, and
JACK BUTLER RACKLEY,

the defendants herein, being connected with the First National Bank, Hammon, Oklahoma: JOHN HUDSON as principal owner, LARRY BARESEL as a member of the Board of Directors, and JACK BUTLER RACKLEY as member of the Board of Directors of said bank, with the

intent to injure and defraud the First National Bank, Hammon, did willfully misapply and cause to be misapplied monies, funds and credits belonging to and intrusted to the care of First National Bank, Hammon, in an amount in excess of $100.

3. In particular, the defendants:

A. Made and caused to be made a nominee loan to Jack Marshall in the amount of $92,000;

B. Caused the promissory note to falsely state that the loan was for "business investment" by Jack Marshall, while knowing that the loan proceeds were to be used for HUDSON'S benefit;

C. Intentionally failed to disclose HUDSON'S interest in the loan proceeds in any book or record of First National Bank, Hammon, causing $92,000 to be disbursed under a record which misrepresented the true nature of the loan transaction.

All in violation of Title 18, United States Code, Sections 656 and 2.

COUNT 14

MISAPPLICATION OF FUNDS
[18 U.S.C. § 656 & § 2]

1. Paragraphs 1 through 17 of the Introduction to this Indictment are realleged and incorporated as though fully set forth herein.

2. On or about February 26, 1987, in the Western District of Oklahoma,

JOHN HUDSON and
JACK BUTLER RACKLEY,

the defendants herein, being connected with the First State Bank, Blanchard, Oklahoma: JOHN HUDSON as principal owner, and JACK BUTLER RACKLEY as member of the Board of Directors of said bank, with the

intent to injure and defraud the First State Bank, Blanchard, did willfully misapply and cause to be misapplied monies, funds and credits belonging to and intrusted to the care of First State Bank, Blanchard, in an amount in excess of $100.

3. In particular, the defendants:

A. Made and caused to be made a nominee loan to Jack Rackley in the amount of $60,000.

B. Caused the promissory note to falsely state that the loan was for RACKLEY'S "business," while knowing that the loan proceeds were to be used for HUDSON'S benefit;

C. Intentionally failed to disclose Hudson's interest in the loan proceeds in any book or record of First State Bank, Blanchard, causing $60,000 to be disbursed under a record which misrepresented the true nature of the loan transaction.

All in violation of Title 18, United States Code, Sections 656 and 2.

COUNT 15

MISAPPLICATION OF FUNDS
[18 U.S.C. § 656 & § 2]

1. Paragraphs 1 through 17 of the Introduction to this Indictment are realleged and incorporated as though fully set forth herein.

2. On or about February 26, 1987, in the Western District of Oklahoma,

JOHN HUDSON and
JACK BUTLER RACKLEY,

the defendants herein, being connected with the First State Bank, Blanchard, Oklahoma: JOHN HUDSON as principal owner, and JACK BUTLER RACKLEY as member of the Board of Directors of said bank, with the intent to injure and defraud the First State Bank, Blan-

chard, did willfully misapply and cause to be misapplied monies, funds and credits belonging to and intrusted to the care of First State Bank, Blanchard, in an amount in excess of $100.

3. In particular, the defendants:

A. Made and caused to be made a nominee loan to Partridge Capital Corporation in the amount of $100,000;

B. Caused the promissory note to falsely state that the loan was for Partridge Capital Corporation's "business," while knowing that the loan proceeds were to be used for HUDSON'S benefit;

C. Intentionally failed to disclose HUDSON'S interest in the loan proceeds in any book or record of First State Bank, Blanchard, causing $100,000 to be disbursed under a record which misrepresented the true nature of the loan transaction.

All in violation of Title 18, United States Code, Sections 656 and 2.

COUNT 16

MISAPPLICATION OF FUNDS
[18 U.S.C. § 656 & § 2]

1. Paragraphs 1 through 17 of the Introduction to this Indictment are realleged and incorporated as though fully set forth herein.

2. On or about February 20, 1987, in the Western Distirct of Oklahoma,

JOHN HUDSON,
LARRY BARESEL, and
JACK BUTLER RACKLEY,

the defendants herein, being connected with the First National Bank, Tipton, Oklahoma: JOHN HUDSON as principal owner, LARRY BARESEL as a member of

the Board of Directors, and JACK BUTLER RACKLEY as president and member of the Board of Directors of said bank, with the intent to injure and defraud the First National Bank, Tipton, did willfully misapply and cause to be misapplied monies, funds and credits belonging to and intrusted to the care of First National Bank, Tipton, in an amount in excess of $100.

3. In particular, the defendants:

A. Made and caused to be made a nominee loan to Tom Lucas in the approximate amount of $60,000;

B. Caused the promissory note to falsely state that the loan was for Tom Lucas' "business," while knowing that the loan proceeds were to be used for HUDSON'S benefit;

C. Intentionally failed to disclose HUDSON'S interest in the loan proceeds in any book or record of First National Bank, Tipton, causing $60,000 to be disbursed under a record which misrepresented the true nature of the loan transaction.

All in violation of Title 18, United States Code, Sections 656 and 2.

COUNT 17

MISAPPLICATION OF FUNDS
[18 U.S.C. § 656 & § 2]

1. Paragraphs 1 through 17 of the Introduction to this Indictment are realleged and incorporated as though fully set forth herein.

2. On or about February 26, 1987, in the Western District of Oklahoma,

JOHN HUDSON and
JACK BUTLER RACKLEY,

the defendants herein, being connected with the First State Bank, Blanchard, Oklahoma: JOHN HUDSON as

principal owner, and JACK BUTLER RACKLEY as member of the Board of Directors of said bank, with the intent to injure and defraud the First State Bank, Blanchard, did willfully misapply and cause to be misapplied monies, funds and credits belonging to and intrusted to the care of First State Bank, Blanchard, in an amount in excess of $100.

3. In particular, the defendants:

A. Made and caused to be made a nominee loan to Tom Lucas in the amount of $40,000;

B. Caused the promissory note to falesely state that the loan was for Tom Lucas' "business," while knowing that the loan proceeds were to be used for HUDSON'S benefit;

C. Intentionally failed to disclose HUDSON'S interest in the loan proceeds in any book or record of First State Bank, Blanchard, causing $40,000 to be disbursed under a record which misrepresented the true nature of the loan transaction.

All in violation of Title 18, United States Code, Sections 656 and 2.

COUNT 18

MISAPPLICATION OF FUNDS
[18 U.S.C. § 656 & § 2]

1. Paragraphs 1 through 17 of the Introduction to this Indictment are realleged and incorporated as though fully set forth herein.

2. On or about February 23, 1987, in the Western District of Oklahoma,

JOHN HUDSON,
LARRY BARESEL, and
JACK BUTLER RACKLEY,

the defendants herein, being connected with the First National Bank, Tipton, Oklahoma: JOHN HUDSON as

principal owner, LARRY BARESEL as a member of the Board of Directors, and JACK BUTLER RACKLEY as president and member of the Board of Directors of said bank, with the intent to injure and defraud the First National Bank, Tipton, did wilfully misapply and cause to be misapplied monies, funds and credits belonging to and intrusted to the care of First National Bank, Tipton, in an amount in excess of $100.

3. In particular, the defendants:

A. Made and caused to be made a nominee loan to David Tuck in the approximate amount of $30,000;

B. Caused the promissory note to falsely state that the loan was for David Tuck's "business," while knowing that the loan proceeds were to be used for HUDSON'S benefit;

C. Intentionally failed to disclose HUDSON'S interest in the loan proceeds in any book or record of First National Bank, Tipton, causing $30,000 to be disbursed under a record which misrepresented the true nature of the loan transaction.

All in violation of Title 18, United States Code, Sections 656 and 2.

COUNT 19

FALSE ENTRY IN BANK RECORD
[18 U.S.C. § 1005]

1. Paragraphs 1 through 17 of the Introduction to this Indictment are realleged and incorporated as though fully set forth herein.

2. On or about February 22, 1987, in the Western District of Oklahoma,

JACK BUTLER RACKLEY,

the defendant herein, knowingly and with intent to deceive the directors of Tipton, the OCC, and the FDIC,

made a materially false entry in the records of First National Bank, Tipton, Oklahoma, by falsely stating in a credit memorandum on David Tuck that the source of Tuck's funds to repay a loan was "income from DMS Realty and Law Practice,' 'and further stating that Tuck was a Chickasha attorney, all of which as RACKLEY was aware, were untrue.

All in violation of Title 18, United States Code, Section 1005.

COUNT 20

MISAPPLICATION OF FUNDS
[18 U.S.C. § 656 & § 2]

1. Paragraphs 1 through 17 of the Introduction to this Indictment are realleged and incorporated as though fully set forth herein.

2. On or about February 19, 1987, in the Western District of Oklahoma,

JOHN HUDSON,
LARRY BARESEL, and
JACK BUTLER RACKLEY,

the defendants herein, being connected with the First National Bank, Hammon, Oklahoma: JOHN HUDSON as principal owner, LARRY BARESEL as a member of the Board of Directors, and JACK BUTLER RACKLEY as member of the Board of Directors of said bank, with the intent to injure and defraud the First National Bank, Hammon, did willfully misapply and cause to be misapplied monies, funds and credits belonging to and intrusted to the care of First National Bank, Hammon, in an amount in excess of $100.

3. In particular, the defendants:

A. Made ad caused to be made a nominee loan to David Tuck in the approximate amount of $20,000;

B. Caused the promissory note to falsely state that the loan was for "Real Estate Construction—Operating Expense" for David Tuck, while knowing that the loan proceeds were to be used for HUDSON'S benefit;

C. Intentionally failed to disclose HUDSON'S interest in the loan proceeds in any book or record of First National Bank, Hammon, causing $20,000 to be disbursed under a record which misrepresented the true nature of the loan transaction.

All in violation of Title 18, United States Code, Sections 656 and 2.

COUNT 21

MISAPPLICATION OF FUNDS
[18 U.S.C. § 656 & § 2]

1. Paragraphs 1 through 17 of the Introduction to this Indictment are realleged and incorporated as though fully set forth herein.

2. On or about February 16, 1987, in the Western District of Oklahoma,

JOHN HUDSON,
LARRY BARESEL, and
JACK BUTLER RACKLEY,

the defendants herein, being connected with the First National Bank, Tipton, Oklahoma: JOHN HUDSON as principal owner, LARRY BARESEL as a member of the Board of Directors, and JACK BUTLER RACKLEY as president and member of the Board of Directors of said bank, with the intent to injure and defraud the First National Bank, Tipton, did willfully misapply and cause to be misapplied monies funds and credits belonging to and intrusted to the care of First National Bank, Tipton, in an amount in excess of $100.

3. In particular, the defendants:

A. Made and caused to be made a loan to Claud Cypert in the approximate amount of $90,000;

B. Caused the promissory note to falsely state that the loan was for Cypert's "business," while knowing that the loan proceeds were to be used for HUDSON'S benefit;

C. Intentionally failed to disclose HUDSON'S interest in the loan proceeds in any book or record of First National Bank, Tipton, causing $90,000 to be disbursed under a record which misrepresented the true nature of the loan transaction.

All in violation of Title 18, United States Code, Sections 656 and 2.

COUNT 22

MISAPPLICATION OF FUNDS
[18 U.S.C. § 656 & § 2]

1. Paragraphs 1 through 17 of the Introduction to this Indictment are realleged and incorporated as though fully set forth herein.

2. On or about February 23, 1987, in the Western District of Oklahoma,

JOHN HUDSON,
LARRY BARESEL, and
JACK BUTLER RACKLEY,

the defendants herein, being connected with the First National Bank, Hammon, Oklahoma: JOHN HUDSON as principal owner, LARRY BARESEL as a member of the Board of Directors, and JACK BUTLER RACKLEY as member of the Board of Directors of said bank, with the intent to injure and defraud the First National Bank, Hammon, did willfully misapply and cause to be misapplied monies, funds and credits belonging to and intrusted to the care of First National Bank, Hammon, in an amount in excess of $100.

3. In particular, the defendants:

A. Made and caused to be made a loan to Claud Cypert in the approximate amount of $90,000;

B. Caused the promissory note to falsely state that the loan was for "Operating Capitol [sic] Blue [sic] energy,' while knowing that the loan proceeds were to be used for HUDSON'S benefit;

C. Intentionally failed to disclose HUDSON'S interest in the loan proceeds in any book or record of First National Bank, Hammon, causing $90,000 to be disbursed under a record which misrepresented the true nature of the loan transaction.

All in violation of Title 18, United States Code, Sections 656 and 2.

JOE HEATON
United States Attorney

/s/ Timothy W. Ogilvie
TIMOTHY W. OGILVIE
Assistant U.S. Attorney

/s/ Barbara E. Poarch
BARBARA E. POARCH
Assistant U.S. Attorney

A TRUE BILL:

/s/ [illegible]
Foreman of the Grand Jury

HUDSON

EXHIBIT "4"

Pet. app., p. 55a

CMP MATRIX

	0	1	2	3	4	Weight Factor	Final Figure
Willful	No		Should Have Known	X	Clear Intent	5	15
Insider	No			Indirect Benefit to Director or Officer or Related Int.	Direct Benefit to Director or Officer or Related Int.	3 X	12
Prev. Adm. Action or Warning	None		Cited in ROSA X	Agreement on Point	C&D on Point or Prior Supervisory Let. on Point	3	6
History	None	Unrelated Prior Violations	Occasional Similar Violations		Repeated Similar Violations X	2	8
Loss	No Loss and No Risk of Loss	No Loss and Low to Moderate Risk	Low to Moderate Loss and Risk		Large Amt. of Actual or Potential Loss X	5	20
Number of Violations					Significant or Numerous Violations X	2	8
Duration of Violations				X	Violation(s) Outstanding for Long Period	2	6
Continuation	Violation(s) Ceased Prior to Notification	Violations Ceased Immediately Upon Notification		Violation(s) X Continued for Period of Time After Notification	Violations Still Continuing	3	9
Concealment	None			Purposely Complicated X Transaction to Make it Difficult to Uncover	Active Concealment From Examiners	5	15
Impact	No Impact on Banking Industry		X		Substantial Impact on Banking Industry or on Public Perception of Banking Industry	6	12
Subtotal 1							111
Restitution	No Restitution X	Complete Restitution Under Compulsion (e.g., Threat of Losing Job)	Partial Restitution	Complete Restitute Immed After Loss or Violation Brought to Attention	Complete Restitution Voluntarily, Before Bank or Examiner Uncovered Loss	2	∅
Good Faith	None X		Unwitting Pawn		Unintentional Violation	3	∅
Full Cooperation	None	X			Forthcoming in Interviews & Depositions & Willing to Testify	2	2
Subtotal 2							2
Total (Subtract 2 From 1)							109

NOTE: Boxes on the Matrix (including the empty boxes) should be used to reflect progressive levels of severity

+ $100M

JANUARY 1988

BEST AVAILABLE COPY

TITLE 12—BANKS AND BANKING
CHAPTER I—COMPTROLLER OF THE CURRENCY, DEPARTMENT OF THE TREASURY

PART 32—LENDING LIMITS

12 CFR 32.5

§ 32.5 Combination rules.

(a) General rule. Loans or extensions of credit to one borrower will be attributed to another person and each person will be deemed a borrower—

(1) When proceeds of a loan or extension of credit are to be used for the direct benefit of the other person, to the extent of the proceeds so used; or

(2) When a common enterprise is deemed to exist between the persons.

(b) Direct benefit. The proceeds of a loan or extension of credit to a borrower will be deemed to be used for the direct benefit of another person and will be attributed to the other person when the proceeds, or assets purchased with the proceeds, are transferred to another person, other than in a bona fide arm's length transaction where the proceeds are used to acquire property, goods, or services.

(c) Common enterprise. A common enterprise will be deemed to exist and loans to separate borrowers will be aggregated:

(1) When the expected source of repayment for each loan or extension of credit is the same for each borrower and neither borrower has another source of income from which the loan (together with the borrower's other obligations) may be fully repaid. An employer will not be treated as a source of repayment under this paragraph because of wages and salaries paid to an employee, unless the standards of paragraph (c)(2) of this section are met;

(2) When loans or extensions of credit are made—

(i) To borrowers who are related directly or indirectly through common control, including where one borrower is directly or indirectly controlled by another borrower; and

(ii) Substantial financial interdependence exists between or among the borrowers. Substantial financial interdependence is deemed to exist when 50 percent or more of one borrower's gross receipts or gross expenditures (on an annual basis) are derived from transactions with the other borrower. Gross receipts and expenditures include gross revenues/expenses, intercompany loans, dividends, capital contributions, and similar receipts or payments;

(3) When separate persons borrow from a bank to acquire a business enterprise of which those borrowers will own more than 50 percent of the voting securities or voting interests, in which case a common enterprise is deemed to exist between the borrowers for purposes of combining the acquisition loans; or

(4) When the OCC determines, based upon an evaluation of the facts and circumstances of particular transactions, that a common enterprise exists.

(d) Special rule for loans to a corporate group. (1) Loans or extensions of credit by a bank to a corporate group may not exceed 50 percent of the bank's capital and surplus. This limitation applies only to loans subject to the combined general limit. A corporate group includes a person and all of its subsidiaries. For purposes of this paragraph, a corporation or a limited liability company is a subsidiary of a person if the person owns or beneficially owns directly or indirectly more than 50 percent of the voting securities or voting interests of the corporation or company.

(2) Except as provided in paragraph (d)(1) of this section, loans or extensions of credit to a person and its

subsidiary, or to different subsidiaries of a person, are not combined unless either the direct benefit or the common enterprise test is met.

(e) Special rules for loans to partnerships, joint ventures, and associations.—(1) Partnership loans, Loans or extensions of credit to a partnership, joint venture, or association are deemed to be loans or extensions of credit to each member of the partnership, joint venture, or association. This rule does not apply to limited partners in limited partnerships or to members of joint ventures or associations if the partners or members, by the terms of the partnership or membership agreement, are not held generally liable for the debts or actions of the partnership, joint venture, or association, and those provisions are valid under applicable law.

(2) Loans to partners. (i) Loans or extensions of credit to members of a partnership, joint venture, or association are not attributed to the partnership, joint venture, or association unless either the direct benefit or the common enterprise tests are met. Both the direct benefit and common enterprise tests are met between a member of a partnership, joint venture or association and such partnership, joint venture or association, when loans or extensions of credit are made to the member to purchase an interest in the partnership, joint venture or association.

(ii) Loans or extensions of credit to members of a partnership, joint venture, or association are not attributed to other members of the partnership, joint venture, or association unless either the direct benefit or common enterprise test is met.

(f) Loans to foreign governments, their agencies, and instrumentalities.—(1) Aggregation. Loans and extensions of credit to foreign governments, their agencies, and instrumentalities will be aggregated with one another only if the loans or extensions of credit fail to meet either the means test or the purpose test at the time the loan or extension of credit is made.

(i) The means test is satisfied if the borrower has resources or revenue of its own sufficient to service its debt obligations. If the government's support (excluding guarantees by a central government of the borrower's debt) exceeds the borrower's annual revenues from other sources, it will be presumed that the means test has not been satisfied.

(ii) The purpose test is satisfied if the purpose of the loan or extension of credit is consistent with the purposes of the borrower's general business.

(2) Documentation. In order to show that the means and purpose tests have been satisfied, a bank must, at a minimum, retain in its files the following items:

(i) A statement (accompanied by supporting documentation) describing the legal status and the degree of financial and operational autonomy of the borrowing entity;

(ii) Financial statements for the borrowing entity for a minimum of three years prior to the date the loan or extension of credit was made or for each year that the borrowing entity has been in existence, if less than three;

(iii) Financial statments for each year the loan or extension of credit is outstanding;

(iv) The bank's assessment of the borrower's means of servicing the loan or extension of credit, including specific reasons in support of that assessment. The assessment shall include an analysis of the borrower's financial history, its present and projected economic and financial performance, and the significance of any financial support provided to the borrower by third parties, including the borrower's central government; and

(v) A loan agreement or other written statement from the borrower which clearly describes the purpose of the loan or extension of credit. The written representation will ordinarily constitute sufficient evidence that the pur-

pose test has been satisfied. However, when, at the time the funds are disbursed, the bank knows or has reason to know of other information suggesting that the borrower will use the proceeds in a manner inconsistent with the written representation, it may not, without further inquiry, accept the representation.

(3) Restructured loans. (i) Non combination rule. Notwithstanding paragraphs (a) through (e) of this section, when previously outstanding loans and other extensions of credit to a foreign government, its agencies, and instrumentalities (i.e., public-sector obligors) that qualified for a separate landing limit under paragraph (f)(1) of this section are consolidated under a central obligor in a qualifying restructuring, such loans will not be aggregated and attributed to the central obligor. This includes any substitution in named obligors, solely because of the restructuring. Such loans (other than loans originally attributed to the central obligor in their own right) will not be considered obligations of the central obligor and will continue to be attributed to the original public-sector obligor for purposes of the lending limit.

(ii) Qualifying restructuring. Loans and other extensions of credit to a foreign government, its agencies, and instrumentalities will qualify for the non-combination process under paragraph (f)(3)(i) of this section only if they are restructured in a sovereign debt restructuring approved by the OCC, upon request by a bank for application of the non combination rule. The factors that the OCC will use in making this determination include, but are not limited to, the following:

(A) Whether the restructuring involves a substantial portion of the total commercial bank loans outstanding to the foreign government, its agencies, and instrumentalities;

(B) Whether the restructuring involves a substantial number of the foreign country's external commercial bank creditors;

(C) Whether the restructuring and consolidation under a central obligor is being done primarily to facilitate external debt management; and

(D) Whether the restructuring includes features of debt or debt-service reduction.

(iii) 50 percent aggregate limit. With respect to any case in which the non-combination process under paragraph (f)(3)(i) of this section applies, a national bank's loans and other extensions of credit to a foreign government, its agencies and instrumentalities (including restructured debt) shall not exceed, in the aggregate, 50 percent of the bank's capital and surplus.

TITLE 12 BANKS AND BANKING
CHAPTER II—FEDERAL RESERVE SYSTEM
SUBCHAPTER A—BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
PART 215—LOANS TO EXECUTIVE OFFICERS, DIRECTORS, AND PRINCIPAL SHAREHOLDERS OF MEMBER BANKS (REGULATION O)
SUBPART A—LOANS BY MEMBER BANKS TO THEIR EXECUTIVE OFFICERS, DIRECTORS, AND PRINCIPAL SHAREHOLDERS

12 CFR 215.4

§ 215.4 General prohibitions.

(a) Terms and creditworthiness—(1) In general. No member bank may extend credit to any insider of the bank or insider of its affiliates unless the extension of credit:

(i) Is made on substantially the same terms (including interest rates and collateral) as, and following credit underwriting procedures that are not less stringent than those prevailing at the time for comparable transactions by the bank with other persons that are not covered by this part and who are not employed by the bank; and

(ii) Does not involve more than the normal risk of repayment or present other unfavorable features.

(2) Exception. Nothing in this paragraph (a) or paragraph (e)(2)(ii) of this section shall prohibit any extension of credit made pursuant to a benefit or compensation program—

(i) That is widely available to employees of the member bank and, in the case of extensions of credit to an insider of its affiliates, is widely available to employees of the affiliates at which that person is an insider; and

(ii) That does not give preference to any insider of the member bank over other employees of the member bank

and, in the case of extensions of credit to an insider of its affiliates, does not give preference to any insider of its affiliates over other employees of the affiliates at which that person is an insider.

(b) Prior aproval. (1) No member bank may extend credit (which term includes granting a line of credit) to any insider of the bank or insider of its affiliates in an amount that, when aggregated with the amount of all other extensions of credit to that person and to all related interests of that person, exceeds the higher of $25,000 or 5 percent of the member bank's unimpaired capital and unimpaired surplus, unless:

(i) The extension of credit has been approved in advance by a majority of the entire board of directors of that bank; and

(ii) The interested party has abstained from participating directly or indirectly in the voting.

(2) In no event may a member bank extend credit to any insider of the bank or insider of its affiliates in an amount that, when aggregated with all other extensions of credit to that person, and all related interests of that person, exceeds $500,000, except by complying with the requirements of this paragraph (b).

(3) Approval by the board of directors under paragraphs (b)(1) and (b)(2) of this section is not required for an extension of credit that is made pursuant to a line of credit that was approved under paragraph (b)(1) of this section within 14 months of the date of the extension of credit. The extension of credit must also be in compliance with the requirements of § 215.4(a) of this part.

(4) Participation in the discussion, or any attempt to influence the voting, by the board of directors regarding an extension of credit constitutes indirect participation in the voting by the board of directors on an extension of credit.

(c) Individual lending limit—No member bank may extend credit to any insider of the bank or insider of its affiliates in an amount that, when aggregated with the amount of all other extensions of credit by the member bank to that person and to all related interests of that person, exceeds the lending limit of the member bank specified in § 215.2(i) of this part. This prohibition does not apply to an extension of credit by a member bank to a company of which the member bank is a subsidiary or to any other subsidiary of that company.

(d) Aggregate lending limit—(1) General limit. A member bank may not extend credit to any insider of the bank or insider of its affiliates unless the extension of credit is in an amount that, when aggregated with the amount of all outstanding extensions of credit by that bank to all such insiders, does not exceed the bank's unimpaired capital and unimpaired surplus (as defined in § 215.2(i) of this part).

(2) Member banks with deposits of less than $100,000,000. (i) A member bank with deposits of less than $100,000,000 may by an annual resolution of its board of directors increase the general limit specified in paragraph (d)(1) of this section to a level not to exceed two times the bank's unimpaired capital and unimpaired surplus, if:

(A) The board of directors determines that such higher limit is consistent with prudent, safe, and sound banking practices in light of the bank's experience in lending to its insiders and is necessary to attract or retain directors or to prevent restricting the availability of credit in small communities.

(B) The resolution sets forth the facts and reasoning on which the board of directors bases the finding, including the amount of the bank's lending to its insiders as a percentage of the bank's unimpaired capital and unimpaired surplus as of the date of the resolution;

(C) The bank meets or exceeds, on a fully-phased in basis, all applicable capital requirements established by the appropriate Federal banking agency; and

(D) The bank received a satisfactory composite rating in its most recent report of examination.

(ii) If a member bank has adopted a resolution authorizing a higher limit pursuant to paragraph (d)(2)(i) of this section and subsequently fails to meet the requirements of paragraph (d)(2)(i)(C) or (d)(2)(i)(D) of this section, the member bank shall not extend any additional credit (including a renewal of any existing extension of credit) to any insider of the bank or its affiliates unless such extension or renewal is consistent with the general limit in paragraph (d)(1) of this section.

(3) Exceptions. (i) The general limit specified in paragraph (d)(1) of this section does not apply to the following:

(A) Extensions of credit secured by a perfected security interest in bonds, notes, certificates of indebtedness, or Treasury bills of the United States or in other such obligations fully guaranteed as to principal and interest by the United States;

(B) Extensions of credit to or secured by unconditional takeout commitments or guarantees of any department, agency, bureau, board, commission or establishment of the United States or any corporation wholly owned directly or indirectly by the United States;

(C) Extentions of credit secured by a perfected security interest in a segregated deposit account in the lending bank; or

(D) Extensions of credit arising from the discount of negotiable or nonnegotiable installment consumer paper that is acquired from an insider and carries a full or partial recourse endorsement or guarantee by the insider, provided that;

(1) The financial condition of each maker of such consumer paper is reasonably documented in the bank's files or known to its officers;

(2) An officer of the bank designated for that purpose by the board of directors of the bank certifies in writing that the bank is relying primarily upon the responsibility of each maker for payment of the obligation and not upon any endorsement or guarantee by the insider; and

(3) The maker of the instrument is not an insider.

(ii) The exceptions in paragraphs (d)(3)(i)(A) through (d)(3)(i)(C) of this section apply only to the amounts of such extensions of credit that are secured in the manner described therein.

(e) Overdrafts. (1) No member bank may pay an overdraft of an executive officer or director of the bank or executive officer or director of its affiliates n3 on an account at the bank, unless the payment of funds is made in accordance with:

n3 This prohibition does not apply to the payment by a member bank of an overdraft of a principal shareholder of the member bank, unless the principal shareholder is also an executive officer or director. This prohibition also does not apply to the payment by a member bank of an overdraft of a related interest of an executive officer, director, or principal shareholder of the member bank or executive officer, director, or principal shareholder of its affiliates.

(i) A written, preauthorized, interest-bearing extension of credit plan that specifies a method of repayment; or

(ii) A written, preauthorized transfer of funds from another account of the account holder at the bank.

(2) The prohibition in paragraph (e)(1) of this section does not apply to payment of inadvertent overdrafts on an account in an aggregate amount of $1,000 or less, provided:

(i) The account is not overdrawn for more than 5 business days; and

(ii) The member bank charges the executive officer or director the same fee charged any other customer of the bank in similar circumstances.

§ 84. Lending limits

(a) Total loans and extensions of credit

(1) The total loans and extensions of credit by a national banking association to a person outstanding at one time and not fully secured, as determined in a manner consistent with paragraph (2) of this subsection, by collateral having a market value at least equal to the amount of the loan or extension of credit shall not exceed 15 per centum of the unimpaired capital and unimpaired surplus of the association.

(2) The total loans and extensions of credit by a national banking association to a person outstanding at one time and fully secured by readily marketable collateral having a market value, as determined by reliable and continuously available price quotations, at least equal to the amount of the funds outstanding shall not exceed 10 per centum of the unimpaired capital and unimpaired surplus of the association. This limitation shall be separate from and in addition to the limitation contained in paragraph (1) of this subsection.

(b) Definitions

For the purposes of this section—

(1) the term "loans and extensions of credit" shall include all direct or indirect advances of funds to a person made on the basis of any obligation of that person to repay the funds or repayable from specific property pledged by or on behalf of the person and, to the extent specified by the Comptroler of the Currency, such term shall also include any liability of a national banking association to advance funds to or on behalf of a person pursuant to a contractual commitment; and

(2) the term "person" shall include an individual, sole proprietorship, partnership, joint venture, associ-

ation, trust, estate, business trust, corporation, sovereign government or agency, instrumentality, or political subdivision thereof, or any similar entity or organization.

(c) Exceptions

The limitations contained in subsection (a) of this section shall be subject to the following exceptions:

(1) Loans or extensions of credit arising from the discount of commercial or business paper evidencing an obligation to the person negotiating it with recourse shall not be subject to any limitation based on capital and surplus.

(2) The purchase of bankers' acceptances of the kind described in section 372 of this title and issued by other banks shall not be subject to any limitation based on capital and surplus.

(3) Loans and extensions of credit secured by bills of lading, warehouse receipts, or similar documents transferring or securing title to readily marketable staples shall be subject to a limitation of 35 per centum of capital and surplus in addition to the general limitations if the market value of the staples securing each additional loan or extension of credit at all times equals or exceeds 115 per centum of the outstanding amount of such loan or extension of credit. The staples shall be fully covered by insurance whenever it is customary to insure such staples.

(4) Loans or extensions of credit secured by bonds, notes, certificates of indebtedness, or Treasury bills of the United States or by other such obligations fully guaranteed as to principal and interest by the United States shall not be subject to any limitation based on capital and surplus.

(5) Loans or extensions of credit to or secured by unconditional takeout commitments or guarantees of any department, agency, bureau, board, commission, or establishment of the United States or any corporation wholly owned directly or indirectly by the United States shall not be subject to any limitation based on capital and surplus.

(6) Loans or extensions of credit secured by a segregated deposit account in the lending bank shall not be subject to any limitation based on capital and surplus.

(7) Loans or extensions of credit to any financial institution or to any receiver, conservator, superintendent or banks, or other agent in charge of the business and property of such financial institution, when such loans or extensions of credit are approved by the Comptroller of the Currency, shall not be subject to any limitation based on capital and surplus.

(8)(A) Loans and extensions of credit arising from the discount of negotiable or nonnegotiable installment consumer paper which carries a full recourse endorsement or unconditional guarantee by the person transferring the paper shall be subject under this section to a maximum limitation equal to 25 per centum of such capital and surplus, notwithstanding the collateral requirements set forth in subsection (a)(2) of this section.

(B) If the bank's files or the knowledge of its officers of the financial condition of each maker of such consumer paper is reasonably adequate, and an officer of the bank designated for that purpose by the board of directors of the bank certifies in writing that the bank is relying primarily upon the responsibility of each maker for payment of such loans or extensions of credit and not upon any full or partial recourse endorsement or guarantee by the transferor, the limitations of this section as to the loans or ex-

tensions of credit of each such maker shall be the sole applicable loan limitations.

(9)(A) Loans and extensions of credit secured by shipping documents or instruments transferring or securing title covering livestock or giving a lien on livestock when the market value of the livestock securing the obligation is not at any time less than 115 per centum of the face amount of the note covered, shall be subject under this section, notwithstanding the collateral requirements set forth in subsection (a)(2) of this section, to a maximum limitation equal to 25 per centum of such capital and surplus.

(B) Loan and extensions of credit which arise from the discount by dealers in dairy cattle of paper given in payment for dairy cattle, which paper carries a full recourse endorsement or unconditional guarantee of the seller, and which are secured by the cattle being sold, shall be subject under this section, notwithstanding the collateral requirements set forth in subsection (a)(2) of this section, to a limitation of 25 per centum of such capital and surplus.

(10) Loans or extensions of credit to the Student Loan Marketing Association shall not be subject to any limitation based on capital and surplus.

(d) Authority of Comptroller of the Currency

(1) The Comptroller of the Currency may prescribe rules and regulations to administer and carry out the purposes of this section including rules or regulations to define or further define terms used in this section and to establish limits or requirements other than those specified in this section for particular classes or categories of loans or extensions of credit.

(2) The Comptroller of the Currency also shall have authority to determine when a loan putatively made to a person shall for purposes of this section be attributed to another person.

§ 375b. Prohibitions respecting loans and extensions of credit to executive officers and directors of banks, political or campaign committees, etc.

(1) No member bank shall make any loan or extension of credit in any manner to any of its executve [1] officers, or to any person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of such member bank, except in the case of such a bank located in a city, town, or village with less than thirty thousand in population, in which case such per centum shall be 18 per centum, or to any company controlled by such an executive officer or person, or to any political or campaign committee the funds or services of which will benefit such an executive officer or person or which is controlled by such an executive officer or person, where the amount of such loan or extension of credit, when aggregated with the amount of all other loans or extensions of credit then outstanding by such bank to such executive officer or person and to all companies controlled by such executive officer or person and to all political or campaign committees the funds or services of which will benefit such executive officer or person or which are controlled by such executive officer or person, would exceed the limits on loans to a single borrower established by section 84 of this title. For purposes of this paragraph, the provisions of section 84 of this title shall be deemed to apply to a State member bank as if such State member bank were a national banking association.

(2) No member bank shall make any loan or extension of credit in any manner to any of its executive officers or directors, or to any person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of such mem-

[1] So in original. Probably should be "executive".

ber bank, or to any company controlled by such an executive officer, director, or person, or to any political or campaign committee the funds or services of which will benefit such executive, director, or person or which is controlled by such executive officer, director, or person, where the amount of such loan or extension of credit, when aggregated with the amount of all other loans or extensions of credit then outstanding by such bank to such executive officer, director, or person and to all companies controlled by such executive officer, director, or person and to all political or campaign committees the funds or services of which will benefit such executive officer, director, or person or which are controlled by such executive officer, director, or person, would exceed an amount prescribed in a regulation of the appropriate Federal banking agency, unless such loan, line of credit, or extension of credit is approved in advance by a majority of the entire board of directors with the interested party abstaining from participating directly or indirectly in the voting.

(3) No member bank shall make any loan or extension of credit in any manner to any of its executive officers or directors, or to any person who directly or acting through or in concert with one or more persons, owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of such member bank, or to any company controlled by such executive officer, director, or person, or to any political or campaign committee the funds or services of which will benefit such executive officer, director, or person or which is controlled by such executive officer, director, or person, unless such loan or extension of credit is made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

(4) No member bank may pay an overdraft on an account at such bank of an executive officer or director.

(5) For purposes of this section, an executive officer, director, or person shall be considered to have control of a company if such executive officer, director, or person, directly or indirectly or acting through or in concert with one or more other persons—

(A) owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the company;

(B) controls in any manner the election of a majority of the directors of the company; or

(C) has the power to exercise a controlling influence over the management or policies of such company.

(6) For the purposes of this section—

(A) the term "person" means an individual or company;

(B) the term "company" means any corporation, partnership, business trust, association, joint venture, pool syndicate, sole proprietorship, unincorporated organization, any other form of business entity not specifically listed herein, or any other trust, but shall not include any insured bank or any corporation the majority of shares of which is owned by the United States or by any State;

(C) a person shall be deemed to be a "director" of a member bank or a "person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has power to vote more than 10 per centum of any class of voting securities of a member bank" if such person has such relationship with any bank holding company of which such member is a subsidiary, as defined by the Bank Holding Company Act (12 U.S.C. 1841), or with any other subsidiary of such bank holding company:

(D) a person shall be deemed to be an "officer" of a member bank if such person is an officer of any bank holding company of which such member bank is a subsidiary, as defined by the Bank Holding Company Act (12 U.S.C. 1841), or with any other subsidiary of such bank holding company;

(E) the term "executive officer" has the same meaning assigned such term under section 375a of this title; and

(F) the term "pay an overdraft on an account" means the payment by a member bank of an amount for an account holder in excess of the funds on deposit in the account and does not include a payment of funds by the member bank in accordance with either a written preauthorized, interest-bearing extension of credit specifying a method of repayment or a written preauthorized transfer of funds from another account of the account holder at that bank.

(7) The Board of Governors of the Federal Reserve System may prescribe such rules and regulations, including definitions of terms, as it deems necessary to effectuate the purposes and to prevent evasions of this section. The Board may further prescribe rules providing a reasonable period of time after November 10, 1978, within which the amount of outstanding loans or extensions of credit made prior to November 10, 1978, shall be reduced so as to conform to the limitations of this section.

(5)

No. 96-976

Supreme Court, U.S.
FILED
JUN 25 1997
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOHN HUDSON, LARRY BARESEL, AND
JACK BUTLER RACKLEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR PETITIONERS

C. MERLE GILE
2200 N. Classen Boulevard
2000 Citizen's Tower
Oklahoma City, OK 73106

JAMES A. ROLFE
2821 Routh Street
Dallas, TX 75201

LYNN PRINGLE
Pringle & Pringle
4101 N. Classen Boulevard
Oklahoma City, OK 73118

JACK L. NEVILLE, JR.
BERNARD J. ROTHBAUM*
LINN & NEVILLE, P.C.
1200 Bank of Oklahoma Plaza
201 Robert S. Kerr Avenue
Oklahoma City, OK 73102
(405) 239-6781
Counsel for Petitioners

LAWRENCE S. ROBBINS
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

55 pp

QUESTIONS PRESENTED

1. Whether the imposition upon petitioners of monetary fines as *in personam* money penalties by the Department of the Treasury, together with other sanctions, is "punishment" for purposes of the Double Jeopardy Clause and, therefore, bars subsequent indictment for the same conduct.

2. Whether such fines may be deemed remedial by reference to the "cost of investigation" allegedly incurred by the agency which assessed them when:

   a. the statute pursuant to which the fines were assessed contains specific criteria for imposing fines and does not authorize consideration of "investigatory costs";

   b. no agency of government contends it was a victim of the conduct for which fines were imposed; and

   c. "costs of investigation" were not considered by the agency assessing the fines in determining whether to impose the fines or the amount thereof.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. 1a-8a) is reported at 92 F.3d 1026. The opinion of the United States District Court for the Western District of Oklahoma (Pet. App. 9a-14a) is reported at 879 F. Supp. 1113. A previous opinion of the court of appeals in this case (Pet. App. 69a-81a) is reported at 14 F.3d 536, while a previous opinion of the district court (Pet. App. 82a-88a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1996. A petition for rehearing was denied on September 20, 1996. Pet. App. 18a-19a. The petition for a writ of certiorari was filed on December 17, 1996, and was granted on April 14, 1997. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the Constitution provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." The provisions of 12 U.S.C. §§ 93(b) and 504 and 18 U.S.C. §§ 371, 656, 1005, and 2 are reproduced in the appendix to the petition for certiorari. The provisions of 12 U.S.C. §§ 84 and 375b are reproduced in the joint appendix (J.A. 53-60).

STATEMENT

Petitioners, who were officers or directors at certain Oklahoma banks, were alleged by the Office of the Comptroller of the Currency ("OCC") to have caused the banks to make "nominee loans," in violation of 12 U.S.C. §§ 84 and 375b. As a result of those violations, petitioners were

subjected in 1989 to money penalties, under 12 U.S.C. §§ 93(b) and 504, and were prohibited from further participation in the affairs of any insured depository institution. Three years later, petitioners were indicted for precisely the same conduct. Petitioners moved to dismiss the indictment, replying on the "multiple punishments" protection of the Double Jeopardy Clause. The court of appeals rejected that claim. Because "there was no gross disproportionality" between the amount of the money penalties and the government's investigative costs in the civil proceeding, the court concluded that the civil sanctions were remedial, not punitive. The court so held even though the money penalties were paid, not to the banks (which were allegedly injured by petitioners' conduct), but to the government (which was not).

A. Statutory Framework

12 U.S.C. §§ 84 and 375b place limitations on the lending policies of banks.[1] Section 84, as implemented by 12 C.F.R. § 32.5, limits the total unsecured loans that a national bank may make to a given individual, while Section 375b, as implemented by 12 C.F.R. §§ 31.2(b) and 215.4(b), limits the amount of money that banks may lend to certain insiders absent prior approval of the board of directors.

Persons who violate Sections 84 or 375b are subject to an array of civil sanctions. First, violators are subject, in their "personal and individual capacit[ies]," to lawsuits seeking to recover any damages arising from the violation. 12 U.S.C. §§ 93(a), 503. Second, the OCC is authorized to impose "a civil

[1] These provisions have been amended in certain respects since the events at issue in this case. Specifically, the Financial Institutions Reform, Recovery and Enforcement Act of 1989 increased the potential range and amount of penalties that may be imposed. See Pub. L. 107-73, § 901(e) (amending 12 U.S.C. § 1818); *id.* §907(e) (amending 12 U.S.C. 93(b)). We refer in the text to the versions in effect at the times relevant to this proceeding.

money penalty of not more than $1,000 per day for each day during which such violation continues." 12 U.S.C. §§ 93(b)(1), 504(a). Finally, if the regulators determine that the violation involves "personal dishonesty" or "willful or continuing disregard" for bank safety, they are authorized by 12 U.S.C. § 1818(e) to institute removal proceedings that may culminate in a prohibition of the individual from any future participation in the affairs of an insured depository institution.

To implement its authority to impose money penalties, the OCC has developed a "CMP [Civil Money Penalty] Matrix." See Ex. 4 (J.A. 39). The matrix lists thirteen factors that the agency will consider in making the penalty assessment. These factors include: willfulness, insider status, previous administrative warnings, history of similar violations, loss, number of violations, duration of violations, continuation of violations after notification by agency, degree of concealment, impact on the industry, payment of restitution, intent or good faith, and cooperation with authorities.

B. The Present Controversy

1. a. During the early and mid-1980's, petitioner John Hudson was the chairman and controlling shareholder of the First National Bank of Tipton, in Tipton, Oklahoma ("Tipton") and the First National Bank of Hammon, in Hammon, Oklahoma ("Hammon"). During the same period of time, petitioner Jack B. Rackley was president at Tipton and a director at Hammon, and petitioner Larry Baresel was a director at both Tipton and Hammon. Pet. App. 89a-90a.

On February 13, 1989, the OCC issued a "Notice of Assessment of a Civil Money Penalty," assessing a $100,000 penalty against Hudson and $50,000 penalties against both Rackley and Baresel, on account of alleged violations of 12 U.S.C. §§ 84 and 375b. Pet. App. 89a-98a. In particular, the OCC alleged that petitioners had arranged for a series of "nominee loans" to be made by Tipton, Hammon, and other institutions to various third parties for the actual benefit of

Hudson, who thereafter used the proceeds to redeem certain bank stock previously held as collateral to secure loans on which Hudson had defaulted. Pet. App. 90a-92a. The Notice specified eight nominee loans that were made between December 29, 1986 and December 31, 1986 (Pet. App. 92a-93a), and an additional thirteen loans that were made between February 19, 1987 and February 27, 1987 (Pet. App. 94a-95a). According to the OCC, these loans were "attributable" to Hudson under OCC regulations and therefore caused both Tipton and Hammon to exceed the lending limits imposed by 12 U.S.C. §§ 84 and 375b. Pet. App. 96a-97a.

In calculating the amount of the assessments, the OCC applied its "Civil Money Penalty Matrix." See Pet. App. 52a. For each petitioner, the agency assessed ten criteria on a scale of 0 to 4, "reflect[ing] progressive levels of severity," and then multiplied each criterion by a prescribed "weight factor." Ex. 4; J.A. 39. For example, the OCC determined that Hudson merited a 3 out of 4 for "willful[ness]," which was then multiplied by a "weight factor" of 5 (the second highest weight factor on the Matrix). The agency also scored Hudson a 3 out of 4 for "concealment," concluding that he had "purposely complicated [the] transaction to make it more difficult to uncover." Ex. 4. This criterion likewise took a "weight factor" multiplier of 5. After weighing the first ten factors, the agency then considered the remaining three criteria — "restitution," "good faith," and "full cooperation" — and subtracted any credits gained in those areas from the subtotal obtained from the first ten factors. Here Hudson got virtually no credit. For example, in the category "good faith" — where the grading ranged from 0 for "none" to 4 for "unintentional violation" — Hudson was scored a 0. Hudson's total score was 109, which resulted in a $100,000 assessment. Substantially the same process was employed by the OCC in assessing penalties of $50,000 against petitioners Baresel and Rackley. Pet. App. 58a-60a.

b. On August 31, 1989, the OCC issued a "Notice of Intention to Prohibit Further Participation" against each of the petitioners. Pet. App. 99a-108a (Hudson Notice), 109a-118a (Baresel Notice), 119a-128a (Rackley Notice). Each Notice was premised on the identical allegations that formed the basis of the Money Penalty Assessments. Compare Pet. App. 90a-97a with *id.* at 100a-107a, 110a-117a, and 120a-127a. Based on those allegations of misconduct, the Comptroller concluded that petitioners had evidenced "a willful and continuing disregard for [the] safety and soundness" of the two banks (*id.* at 108a, 118a, 128a) and that accordingly each of the three petitioners should be prohibited "from further participation, in any manner, in the conduct of the affairs of any insured depository institution" (*id.* at 100a, 110a, 120a). "In essence, the OCC sought to prohibit [petitioners] from all banking activities." Pet. App. 70a.

c. In agreements executed by the parties in October and November 1989, petitioners consented to the imposition of civil money penalties: $16,500 against Hudson, $12,500 against Rackley, and $15,000 against Baresel. Petitioners also consented to a broad prohibition stating that, absent "prior written consent of both the Comptroller and [other agency heads]," they would not "participate in any manner" in the affairs of, *inter alia*, "any insured depository institution," "any institution treated as an insured bank," "any insured credit union," or "any institution chartered under the Farm Credit Act of 1971." Pet. App. 129a-133a (Hudson Stipulation), 134a-138a (Rackley Stipulation), 139a-143a (Baresel Stipulation).[2]

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[2] Each of the Stipulations also contained language stating that nothing in the agreement would constitute "a waiver of any right, power, or authority of any other representatives of the United States, or agencies thereof, to bring other actions deemed appropriate." Pet. App. 133a, 138a, 143a.

2. On August 25, 1992, petitioners were indicted in the United States District Court for the Western District of Oklahoma in a 22-count indictment that is concededly based on "the same transactions upon which the OCC sanctions were based" (Pet. App. 2a-3a). See Brief for the United States at 4. The indictment charged petitioners with misapplication of funds in violation of 18 U.S.C. §§ 656 and 2 (Counts 2-7, 9-18, 20-22), and with conspiracy to misapply bank funds and to make false entries in bank records in violation of 18 U.S.C. § 371 (Count 1). The indictment also charged petitioner Rackley with two substantive counts of making false bank entries in violation of 18 U.S.C. § 1005 (Counts 8 and 19).[3]

The indictment recited the same underlying transactions as the OCC Notices. Each of the misapplication counts corresponded to a particular "nominee loan" for which petitioners had already been civilly sanctioned. Compare J.A. 17-38 with Pet. App. 90a-97a. Each of the overt acts in the conspiracy count likewise corresponded to nominee loans and to the use of those loans in redeeming Hudson's stock. Compare J.A. 12-17 with Pet. App. 90a-97a. And the two false entry counts were based on two particular nominee loans in which Rackley had been involved. Compare J.A. 23-24, 34-35 with Pet. App. 93a, 94a.

Petitioners thereafter moved to dismiss the indictment on double jeopardy grounds. In an Order dated March 25, 1993, the trial court denied the motion. Pet. App. 82a-88a. Relying (Pet. App. 84a-85a) on this Court's decision in *United States* v. *Halper*, 490 U.S. 435 (1989), the court acknowledged that

[3] More specifically, Hudson was charged in the conspiracy count and in all of the misapplication counts. Rackley was charged in the conspiracy count, in seventeen of the misapplication counts (Counts 2, 4-7, 9-10, 12-18, and 20-22), and in both false entry counts. Baresel was charged in the conspiracy count and in fifteen of the misapplication counts (Counts 2, 4-7, 9-13, 16, 18, and 20-22).

"'a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as serving either retributive or deterrent purposes, is punishment" (Pet. App. 85a). And the court recognized as well (*ibid.*) that the principles in *Halper* "'should apply whether the civil penalty precedes or follows the criminal proceeding.'" The court concluded (*id.* at 85a-86a), however, "that the non-participation agreement and the agreed fines were solely remedial." The court alternatively concluded (Pet. App. 88a) that petitioners had waived any double jeopardy claim by agreeing to the language in the Stipulations stating that the agreements "did not constitute 'a waiver of any right, power, or authority of any other representatives of the United States, or agencies thereof, to bring other actions deemed appropriate.'"

3. The court of appeals reversed in part, affirmed in part, and vacated and remanded in part. Pet. App. 69a-81a. The court first rejected (*id.* at 71a-72a) the contention that petitioners had waived their double jeopardy rights. On the merits, the court explained that, under *Halper* and this Court's subsequent decision in *Austin* v. *United States*, 509 U.S. 602 (1993), "a sanction should be considered punishment if it is not solely remedial," and that "if a particular remedial sanction can only be understood as also serving punitive goals, then the person subjected to the sanction has been punished despite the fact that the sanction is also remedial." The court also stated (Pet. App. 75a) that "a civil sanction's being exacted first does not alter the applicability of *Halper*."

In applying these principles, the court of appeals considered each of the sanctions separately (rather than as a combined exaction). Pet. App. 75a-78a (nonparticipation sanctions), 78a-81a (money sanctions). The court agreed with the district court that the nonparticipation sanction was remedial because it "was solely designed to protect the integrity of the banking industry by purging the system of corrupt influences" (*id.* at 78a). However, it vacated the trial

court's ruling on the money sanctions. The court explained (*id.* at 79a) that merely because the penalty statutes as a whole may serve remedial ends "does not necessarily mean that sanctions imposed thereunder are solely remedial." Moreover, the court noted (Pet. App. 79a-80a), the factors that are taken into account in imposing money penalties — such as "history of violations, a party's financial resources and good faith, and the gravity of the violation" — "are equally consistent with a deterrence determination." What is more, the court observed (*id.* at 80a), the $1000 per day penalties contained in 12 U.S.C. §§ 93(b) and 504 "appear to be designed, at least in part, to punish and deter improper conduct."[4] And even if the money penalties were "reasonable," the court added (Pet. App. 80a), that would not necessarily resolve the double jeopardy inquiry: "[A] money sanction can be reasonably related to one's violations and still be used as punishment."

The court therefore remanded the case so that the district court could "determine the precise injury caused to the Government for which the sanctions are the remedy." Pet. App. 80a. "If there was no injury to be remedied, then presumably the fines were imposed to deter the [petitioners] from continued violations. If there was an injury, the court must determine if the fines were in fact intended solely to remedy the injury, which will include a determination whether they were reasonable." *Id.* at 81a.[5]

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[4] In that connection, the court noted (Pet. App. 80a) that there is a separate statutory provision, 12 U.S.C. § 93(a), that provides a compensatory remedy for "injured parties for losses incurred by the same conduct that is subjected to penalties pursuant to §§ 93(b) and 504."

[5] The court also stated (Pet. App. 81a) that on remand it might be necessary to decide whether the offenses for which petitioners were sanctioned civilly were the same as those on which they had been indicted.

4. On remand, the trial court entertained a hearing on whether the money penalties constituted "punishment" within the meaning of double jeopardy principles. Pet. App. 20a-68a. The government called one witness, Daniel Stipano, the Assistant Director of the Enforcement and Compliance Division of the OCC. *Id.* at 22a. Stipano explained that the civil money penalties in this case were not intended to provide restitution, as the OCC did not have "the legal authority to order restitution at that time." *Id.* at 33a. Instead, the penalties were generally intended "to deter future violations of law or encourage the correction of existing violations," while the removal action was designed to prevent petitioners "from working in the banking industry again so that they cannot engage in additional violations or inside practices." *Id.* at 36a. What is more, Stipano added, the penalties were reserved for cases of willful misconduct; in fact, he stated, the OCC did not at the time have the authority to make the assessments it did in this case had petitioners' conduct been merely negligent. *Id.* at 62a.

Stipano also provided testimony concerning the government's costs of investigation and prosecution. Pet. App. 33a-34a, 38a-40a; Ex. 19. The centerpiece of this proof was Exhibit 19, a letter to the prosecutor in which Stipano had estimated the total costs at about $72,000. See Pet. App. 44a. In calculating the costs, Stipano was able to estimate some figures, such as travel, with "a degree of reliability," while others were "less precise." In the latter category, Stipano included his and his colleagues' salaries, where to make the estimates he simply divided the annual salaries plus benefits by the percentage of time that he thought was allocable to this investigation. *Id.* at 39a-40a.

Stipano made clear, however, that these costs of investigation and prosecution had nothing to do with the decision to impose money penalties or the amount of penalties imposed. Indeed, when asked whether the purpose of his letter to the prosecutor (Ex. 19) was to "establish[] what you

claim to be the government loss for purposes of this hearing." Stipano replied: "I don't know why he wanted it. He asked me to provide it." Pet. App. 38a.[6] Clearly, the original penalty assessments were made without regard to the government's costs — in fact, the initial recommendation that assessments of $100,000 and $50,000 be imposed (as they ultimately were) was made before virtually any of the investigatory and prosecution costs had been incurred. *Id.* at 40a-42a. As for the eventual amount of the money penalties, Stipano stated that "[t]he primary reason" why they were less than the assessments was that petitioners "had no money." *Id.* at 31a-32a.

On December 16, 1994, the district court granted the motion to dismiss the indictment on double jeopardy grounds. Pet. App. 9a-14a. Applying (*id.* at 10a) this Court's decision in *Blockburger* v. *United States*, 284 U.S. 299 (1932), the court first held that the offenses in both the civil and criminal proceedings were the same for double jeopardy purposes. The government had "concede[d] that the violations which were the subject of the Consent Order and those charged in the indictment are based on the same loan transactions." Pet. App. 11a. Moreover, the court observed (*ibid.*), "a violation of the statutes under which the OCC proceeded in the Consent Order necessarily encompasses a violation of 18 U.S.C. § 656."

The court next held (Pet. App. 12a-14a) that the money penalties in this case were not "solely remedial" and must therefore be regarded as punishment for double jeopardy purposes. Based on the testimony and exhibits, the court found (*id.* at 13a) that the sanctions were designed, at least in part, as a "'deterrent to similar violations * * * by other banks

[6] In fact, Stipano began to assemble the information in Exhibit 19 only about one week before sending the letter to the prosecutor. Pet. App. 38a.

and bankers.'" Moreover, "[t]he evidence before the court does not indicate that injury to the government was considered by the OCC in deciding the amount of the penalties to be imposed." *Id.* at 13a-14a. Indeed, the court observed (*id.* at 14a), "Mr. Stipano testified that the OCC did not have the legal authority to use its enforcement powers to compel officers and directors to make restitution under the statutory provisions in existence at the time the penalties were assessed." And while there was evidence suggesting that the government had incurred "investigative costs" of about $72,000, "the record contains no indication that these costs were considered by the OCC in determining the recommended fines" (*ibid.*). The district court concluded (*ibid.*): "Assuming, *arguendo*, that these [civil sanctions] had some remedial purpose, the evidence establishes that they were at least partially designed to serve as a deterrent. Thus, the fines were punitive for double jeopardy purposes."

5. The court of appeals again reversed. Pet. App. 1a-8a. In the court's view (*id.* at 4a), "[u]nder the objective test outlined in *Halper*, a particular sanction is not punishment when it bears a rational relation to the goal of compensating the government for its loss." In the present case, the court observed (*ibid.*), "there was no gross disproportionality between the total fines imposed, $44,000, and the proven damages to the government, $72,000."[7]

INTRODUCTION AND SUMMARY OF ARGUMENT

"This Court many times has held that the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and

[7] Having concluded that the civil sanctions did not constitute punishment, the court declined to reach the question whether the civil sanctions were imposed for the "same offenses" as were charged in the indictment. Pet. App. 3a n.3.

multiple punishments for the same offense." *United States* v. *Halper*, 490 U.S. 435, 440 (1989). Accord, *Ohio* v. *Johnson*, 467 U.S. 493, 498-499 (1984); *Illinois* v. *Vitale*, 447 U.S. 410, 415 (1980); *Abney* v. *United States*, 431 U.S. 651, 660-661 (1977); *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). Moreover, with respect to the "multiple punishments" component, "the language of the Double Jeopardy Clause protects against more than the actual imposition of two punishments for the same offense; by its terms, it protects a criminal defendant from being *twice put in jeopardy* of such punishment." *Witte* v. *United States*, 115 S. Ct. 2199, 2204 (1995) (emphasis in the original). Thus, the Double Jeopardy Clause prohibits, not only punishing twice, but also "'attempting a second time to punish criminally for the same offense.'" *United States* v. *Ursery*, 116 S. Ct. 2135, 2139-2140 (1996).

Applying those principles, this Court unanimously held in *United States* v. *Halper*, 490 U.S. 435 (1989), that money penalties, although imposed in a civil proceeding, constitute "punishment" for double jeopardy purposes when they "cannot fairly be said *solely to serve a remedial purpose*, but rather can only be explained as also serving either retributive or deterrent purposes." *Id.* at 448 (emphasis added). As we show below, the government did not establish *any* remedial purpose served by the money penalties it imposed on petitioners. Still less can it be said that the penalties served *solely* a remedial purpose. In short, the money penalties — particularly when considered in conjunction with the debarment imposed on petitioners — were plainly punitive. Moreover, because the indictment in this case charges petitioners with "the same offenses" for which they were civilly sanctioned, and because it is irrelevant for double jeopardy purposes that the civil sanctions preceded the criminal sanctions (rather than vice versa), the district court correctly dismissed the indictment, and the court of appeals' contrary ruling should be reversed.

A. The money penalties were clearly punitive. The text and structure of the governing provisions reveal that the penalties were designed solely to deter and to achieve retribution — not for "remedial" purposes. Indeed, there are entirely separate sections of the statute that authorize injured parties to sue violators for any damages resulting from violations. Turning from the underlying statute to the particular sanctions in this case reenforces the conclusion that the money penalties were punitive. The agency based its decision to impose the money penalties on a host of factors — such as willfulness, intent, concealment, and prior bad acts — that traditionally are associated with punitive, not "remedial," purposes.

Nor were the money penalties "remedial" simply because they happened to approximate the government's investigative costs in this case. In the first place, the penalties were paid to the United States Treasury, not to the allegedly injured banks, and thus they were not "remedial" in any conventional sense of the term. In any event, the sanctions in this case were not designed, either by Congress or by the agency, to compensate the government for its investigative costs. That rationale was simply the after-the-fact contrivance of a federal prosecutor seeking to overcome a double jeopardy challenge.

B. It does not matter for double jeopardy purposes that the civil case came first and the criminal case came second, rather than vice versa. *Halper* held that a civil sanction can (in some cases) violate the Double Jeopardy Clause. This must be because the action seeking the civil sanction places the defendant in "jeopardy." And whether that civil "jeopardy" comes first or second cannot possibly make a difference. The government's contrary view has been rejected by every court to have considered it and cannot withstand analysis.

C. Both the civil sanctions and the indictment in this case were for "the same offense." First, this Court's double

jeopardy cases involving consecutive civil and criminal proceedings have invariably articulated a "same conduct," not "same elements," standard in describing whether the offenses are the same. And there is no dispute that the indictment charges petitioners with exactly the same conduct for which they were previously sanctioned civilly. But even under the "same elements" test articulated in *Blockburger* the misapplication and conspiracy counts must be dismissed. Under this Court's cases, the *Blockburger* analysis must focus on the government's actual prosecution of the defendant — not some theoretical prosecution the government might someday pursue. Here, the civil sanctions rested on a finding of elements that are entirely sufficient to prove the misapplication and conspiracy charges as well. Accordingly, those counts in the indictment are "the same offense" for purposes of double jeopardy protections.

ARGUMENT

PETITIONERS' CRIMINAL PROSECUTION IS BARRED BY THE DOUBLE JEOPARDY CLAUSE

A. The Civil Sanctions Imposed On Petitioners Constituted "Punishment" For Purposes Of The Double Jeopardy Clause

Petitioners were assessed $200,000, and ultimately paid some $44,000, in money penalties. These sums were paid *not* to the banks (which suffered the alleged injury in this case) but to the United States Treasury (which did not). In the court of appeals' view, those penalties were nevertheless "remedial" because they were not "gross[ly] disproportionate" to the government's cost of investigating the case. This Court, however, has never found a money penalty to be "remedial," absent an actual injury to the government, merely because the government incurred some expense in investigating injuries sustained by *other* parties. And even if covering the government's investigative costs *could* be deemed

"remedial," the actual purpose for imposing the money penalty sanctions in this case was unmistakably punitive. Indeed, there is no reason to believe that the money penalties imposed on petitioners had *any* remedial purpose, much less that they were "solely" remedial, as *Halper* requires. As such, the money penalty component of the civil sanctions in this case was punitive, at least in part.

1. Under this Court's cases, a civil penalty constitutes "punishment" for double jeopardy purposes if a "particularized assessment" of the penalty reveals that its "actual" purpose is not to remedy an injury to the government but rather to deter or to provide retribution

a. This Court's cases make clear that money penalties, even when denominated "civil," may nevertheless constitute punishment for double jeopardy purposes where their actual purpose is not remedial, but is instead to provide deterrence or retribution. As the Court explained in *United States* v. *La Franca*, 282 U.S. 568, 573 (1931) (emphasis added), "[t]he term 'penalty,' involves the idea of punishment, *and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution.*" Where money penalties are imposed, not to remedy an injury to the government, but simply as "an exaction imposed by statute as punishment for an unlawful act," a "grave constitutional question" (*id.* at 572) may be presented by successive proceedings.[8]

One of the earliest applications of this principle was in *Helvering* v. *Mitchell*, 303 U.S. 391 (1938). There, the Court upheld against a double jeopardy challenge the imposition of a penalty for tax evasion equal to 50% of the taxes owed.

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[8] See also *United States* v. *Ursery*, 116 S. Ct. 2135, 2142 (1996) ("*in rem* civil forfeiture is a remedial civil sanction, distinct from potentially punitive *in personam* civil penalties").

The Court found that the penalty was remedial, and not punitive, because it was "provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud." *Id.* at 401. In light of this plainly remedial purpose — to safeguard the government's revenue collections and to cover the related enforcement costs — the Court held that the Double Jeopardy Clause did not apply.

The Court reached a like result in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943), in which the question was whether the Double Jeopardy Clause barred a civil *qui tam* action following a conviction for the same underlying conduct. The Court explained (*id.* at 548-549) that there is a "line between civil, remedial actions brought primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate public justice." "Only the latter," the Court stated, "subject the defendant to 'jeopardy' within the constitutional meaning." *Id.* at 549. Applying that distinction, the Court held that the *qui tam* lawsuit was remedial because the "payment of a lump sum and double damages" would not "do more than afford the government complete indemnity for the injuries done it." *Ibid.* Looking both to the text of the underlying statute (*ibid.*), as well as to its legislative history (*id.* at 552), the Court concluded (*id.* at 551-552) that "the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole."

The same held true in *Rex Trailer Co., Inc.* v. *United States*, 350 U.S. 148 (1956). The question in *Rex Trailer* was whether the Double Jeopardy Clause barred a civil action to recover money penalties under the Surplus Property Act of 1944 following the defendant's conviction for fraudulently purchasing surplus government trucks. The Court held that

the Double Jeopardy Clause was not implicated because the civil action was remedial in nature. "It is obvious," the Court stated, "that injury to the Government resulted from [petitioner's] fraudulent purchase of trucks." *Id.* at 153. And while "[t]he damages resulting from this injury may be difficult or impossible to ascertain, * * * it is the function of liquidated damages to provide a measure of recovery in such circumstances." *Id.* at 153-154.

b. In *Mitchell*, *Hess*, and *Rex Trailer*, the Court was careful to note that the sanction was actually designed to remedy an injury to the government, together with the enforcement costs associated with that injury. By contrast, however, when a money penalty is *not* designed to remedy an injury to the government, but instead is intended to serve the purposes of deterrence or retribution, the Court has made clear that it constitutes punishment. The Court made that point, in a related context, in *Helwig* v. *United States*, 188 U.S. 605 (1903). Appellants in that case had been assessed extra customs duties for failing to declare the full value of certain merchandise. They contested the jurisdiction of the Circuit Court on the ground that the extra duties were penal, not revenue-raising in nature, and that jurisdiction over the matter therefore lay in the District Court. This Court held that the extra duties were indeed penal. The Court pointed out that the loss to the government through the undervaluation was a mere $354, and yet the extra duties amounted to $9067.68. As such, the Court observed (*id.* at 611), the extra duty "is without doubt a punishment upon the importer * * *. Whether the statute defines it in terms as a punishment or penalty is not important, if the nature of the provision itself be of that character." Accord, *La Franca*, 282 U.S. at 572.

This Court's unanimous decision in *Halper* reaffirms the proposition that a money penalty not designed and fairly apportioned to remedy a harm to the government constitutes punishment for double jeopardy purposes. Halper was the target of a civil False Claims Act (31 U.S.C. 3729-3731)

lawsuit following his prosecution, conviction, and sentencing on 65 counts arising from false reimbursement claims he had submitted to the United States. Although the false claims had caused a loss to the United States of only $585, in the subsequent civil action Halper was subject to a statutory penalty of more than $130,000. The question presented in *Halper* was "whether a civil sanction, in application, may be so divorced from any remedial goal that it constitutes 'punishment' for the purpose of double jeopardy analysis." 490 U.S. at 443. The Court unanimously held that it could.

The Court began by rejecting the government's contention that a sanction could be punitive only if Congress expressly said that it was. 490 U.S. at 447. The Court explained that "while recourse to statutory language, structure, and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter, the approach is not well suited to the context of the 'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments." *Ibid.*[9] "This constitutional protection," the Court emphasized, "is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state." *Ibid.*

A civil sanction constitutes punishment, the Court stated, "when the sanction as applied in the individual case serves the goals of punishment." 490 U.S. at 448. In particular, the Court held (*ibid.* (emphasis added)):

[9] See also *Breed* v. *Jones*, 421 U.S. 519, 528 n.10 (1975) ("Distinctions which in other contexts have proved determinative of the constitutional rights of those charged with offenses * * * have not similarly confined the protection of the Double Jeopardy Clause").

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> a civil sanction that cannot fairly be said *solely to serve a remedial purpose*, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

In view of the "disproportionate" relationship between Halper's potential civil penalty and the apparent losses and costs to the government arising from Halper's conduct, the Court concluded (*id.* at 452) that the civil sanction might well constitute punishment. It remanded the case to afford the government an opportunity to show that its actual costs were higher than the district court had surmised. *Ibid.*

c. This Court's money penalty cases stand for four principles that should control the present case. *First* and foremost, there is a dividing "line," as the Court explained in *Hess* (317 U.S. at 548), between *remedial* penalties (that do not implicate double jeopardy) and *punitive* penalties (that do). "[R]emedial actions," the Court made clear (*id.* at 548-549), are those that are "brought primarily to protect the government from financial loss," whereas penalties constitute punishment when they seek "to vindicate public justice." True, a penalty may be remedial even when it includes an extra component to account for the costs of investigation and enforcement. But in each case in which the Court has found money penalties to be remedial, the Court was able to discern from the statute, and from the particular facts of the case, that the penalty actually served to "afford the government complete indemnity for the *injuries* done it." *Id.* at 549 (emphasis added).

Second, in deciding whether a particular sanction is truly remedial, courts are not free simply to imagine remedial purposes that might plausibly be ascribed, after-the-fact, to the sanction imposed. Rather, based on the underlying statute, and "a particularized assessment of the penalty imposed" (*Halper*, 490 U.S. at 448), they must determine "the goal" of the penalty (*id.* at 451) and decide whether that goal is remedial or punitive. The question in each case is whether the

penalty was "motivated by penal * * * intent" and thus "intended for punishment." *Department of Revenue of Montana* v. *Kurth Ranch*, 511 U.S. at 779 nn. 16-19 (1994). And as the Court held in *Halper*, "in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes *actually served* by the sanction in question * * * that must be evaluated." *Halper*, 490 U.S. at 447 n.8 (emphasis added). Only be assessing "the purposes that the penalty may *fairly be said to serve*" can courts make "the determination whether a given civil sanction constitutes punishment in the relevant sense" (*id.* at 448) (emphasis added).

Third, a sanction may be punitive, at least in part, even if it also serves some remedial purpose. As the Court in *Halper* put it (490 U.S. at 448): "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." Thus, the Court held (*id.* at 448-449), a civil sanction that is remedial in part is nevertheless punitive "to the extent" that it "may not fairly be characterized as remedial, but only as a deterrent or retribution." See also *Austin* v. *United States*, 509 U.S. 602, 610 (1993) (so long as a civil sanction "can only be explained as serving in part to punish," it must be regarded, at least to that extent, as punishment).

Finally, in making assessments of the purpose of the sanction, it is not enough to examine the underlying statute in the abstract. Rather, because "[t]his constitutional protection is intrinsically personal" (*Halper*, 490 U.S. at 447), courts must make a "case-by-case" (*Ursery*, 116 S. Ct. at 2145) evaluation, engaging in what the Court called in *Halper* (490 U.S. at 448) "a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve." Even an avowedly civil sanction may constitute punishment "when the sanction *as applied in the individual*

case serves the goals of punishment." *Ibid.* (emphasis added). Courts must therefore examine, not only the organic statutes, but also "the character of the actual sanctions." *Id.* at 447. Accord *Kurth Ranch*, 511 U.S. at 779.

2. Applying these principles, there is no doubt that the civil sanctions imposed on petitioners constituted punishment for double jeopardy purposes

There is simply no question that the civil sanctions imposed in this case crossed the "line between civil, remedial actions brought primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate public justice." *Hess*, 317 U.S. at 548-549. To say the least, the sanctions "cannot fairly be said *solely to serve a remedial purpose*, but rather can only be explained as also serving either retributive or deterrent purposes." *Halper*, 490 U.S. at 448 (emphasis added). Indeed, apart from the late-blooming "investigatory costs" theory, the government has not identified *any* remedial purpose that was served by the money penalties imposed on petitioners.

It is important to emphasize that there were two distinct civil sanctions in this case — prohibition orders and money penalties. Although the court of appeals analyzed the prohibition orders separately from the money penalties (see Pet. App. 75a-81a), petitioners were in fact subjected to *both* sanctions. The question whether the money penalties constituted punishment (at least in part) cannot be answered without taking into account that petitioners were also banned from the industry. A "particularized assessment" of the *entire* civil sanction in this case reveals that the money penalty portion was clearly, indeed starkly, punitive.

a. Petitioners were subjected to money penalties under 12 U.S.C. §§ 93(b) and 504 and a prohibition from further participation in insured banks under 12 U.S.C. 1818(e).

Sections 93(b) and 504 are denominated "civil *penalty*" provisions, and the very use of that term suggests, at a minimum, the possibility that punishment may be at work. As this Court pointed out just last year, "if the concept of penalty means anything, it means punishment for an unlawful act or omission." *United States* v. *Reorganized CF & I Fabricators of Utah, Inc.*, 116 S. Ct. 2106, 2113 (1996). Or, as the Court put it in *La Franca* (which expressly addressed double jeopardy concerns), "a 'penalty,' as the word is here used, is an exaction imposed by statute as punishment for an unlawful act." 282 U.S. at 572.

The text of the penalty provisions confirms that punishment is indeed the purpose of the penalties. Sections 93(b) and 504 each provide that the Comptroller of the Currency "shall" impose a penalty of not more than $1,000 per day on account of certain prescribed violations of law. Tying the payment of a penalty to the commission of "illegal conduct" may not be dispositive of "penal" intent, but it is assuredly a strong indicator of it. *Kurth Ranch*, 511 U.S. at 782; *United States* v. *Constantine*, 296 U.S. 287, 295 (1935). Particularly where, as here, the identical conduct is in fact (and indeed is being prosecuted as) a crime, the tie between the money penalties and the unlawful conduct strongly indicates a punitive intent. See also *Kansas* v. *Hendricks*, No. 95-1649 (June 23, 1997), slip op. 14 (commitment statute "is not retributive because it does not affix culpability for prior criminal conduct"); *Austin*, 509 U.S. 602; *United States* v. *United States Coin & Currency*, 401 U.S. 715, 721-722 (1971); *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700 (1965).

What is more, the money penalties are paid, not to "remedy" any injury to the affected banking institution, but "into the Treasury of the United States." 12 U.S.C. §§

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93(b)(8), 505(7).[10] Indeed, there are entirely separate sections of the relevant statutes that explicitly provide for compensation to the injured institutions. Sections 93(a) and 503 authorize damages actions against directors (under Section 93(a)) and officers (under both provisions) "for all damages" arising from specified violations, including violations of Sections 84 and 375b. These truly "remedial" provisions entitle the institution, its shareholders, and "any other person" who "shall have sustained [damages] in consequence of such violation" to sue the directors and officers in their "personal and individual capacity." 12 U.S.C. §§ 93(a), 503. Sections 93(a) and 503 are quite broad: they may be invoked by a receiver for an insolvent bank (*Briggs* v. *Spaulding*, 141 U.S. 132 (1891)), by the bank itself (*Yates* v. *Jones National Bank*, 206 U.S. 158 (1907)), by a potential investor (*Thomas* v. *Taylor*, 224 U.S. 73 (1912)), and by depositors or other creditors (*Chesbrough* v. *Woodworth*, 244 U.S. 72 (1917)). If, in fact, the government truly sustained a "loss" on account of petitioners' conduct, presumably Sections 93(a) and 503 would provide a damages remedy. But the government did not invoke those sections. Instead, it sought money penalties under Sections 93(b) and 504. The very fact that there are broad and explicitly remedial provisions *elsewhere* in the statute suggests that the money penalties in Sections 93(b) and 504 serve a different function — deterrence or retribution, "the twin aims" of punishment. *Halper*, 490 U.S. at 448. Cf. *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is

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[10] Cf. *Hicks* v. *Feiock*, 485 U.S. 624, 632 (1988) (a fine assessed in a contempt proceeding "is remedial when it is paid to the complainant, and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order").

generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

In addition, in setting the "amount of the penalty" Sections 93(b)(2) and 504(b) direct the Comptroller to consider a range of factors, none of which involves the costs (investigative or otherwise) sustained by the government. In particular, the Comptroller is required to "take into account the appropriateness of the penalty with respect to the size of the financial resources and good faith of the * * * person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require." Not only are these factors wholly unrelated to the government's costs, they are in fact among the most traditional factors bearing on the appropriate level of *punishment*.[11] Indeed, each of these factors is a ground for calculating criminal punishment under the Sentencing Guidelines. See, *e.g.*, U.S.S.G. § 5E1.2(d)(2) (in setting fine,

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[11] See, *e.g.*, *Bearden* v. *Georgia*, 461 U.S. 660, 669-670 (1983) ("the sentencing court can consider the entire background of the defendant, including his * * * financial resources"); *San Antonio Indep. Sch. Dist.* v. *Rodriquez*, 411 U.S. 1, 22 (1973) (in setting criminal fines, "[s]entencing judges may, and often do, consider the defendant's ability to pay"); *Enmund* v. *Florida*, 458 U.S. 782, 800 (1982) ("American criminal law has long considered a defendant's intention — and therefore his moral guilt — to be critical to 'the degree of [his] criminal culpability'"); *United States* v. *Grayson*, 438 U.S. 41, 46 (1978) ("[e]ach particular offense [is] to be punished in proportion to the social harm caused by it"); *Witte* v. *United States*, 115 S. Ct. 2199, 2205-2206 (1995) (an enhanced penalty because of earlier offenses is simply "'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one'"); *Nichols* v. *United States*, 511 U.S. 738, 742 (1994) ("[s]entencing courts have not only taken into consideration a defendant's prior convictions, but have also considered a defendant's past criminal behavior, even if no conviction resulted from that behavior").

court "shall consider * * * the defendant's ability to pay the fine"); *id.* § 4A1.1 (augmenting sentence based on prior sentences of imprisonment); *id.* § 2F1.1 (augmenting sentence for fraud and deceit based on amount of losses caused); *id.* at 2Q1.2 Application Note 4 (downward departure may be warranted where conduct was not knowingly performed).[12]

In short, the text and structure of Sections 93(b) and 504 demonstrate that the money penalties were not intended to be remedial, but rather were designed wholly to deter or for retribution. And the legislative history confirms the point. As explained in the House Report accompanying the Financial Institutions Regulatory Act of 1978, "[d]aily money penalties should serve as deterrents to violations of laws, rules, regulations, and orders of the agencies." H.R. Rep. No. 95-1383 at 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9273, 9289. Money penalties, the Congress concluded, "give an agency the flexibility it needs to secure compliance by individuals or institutions." *Ibid.*

b. Turning to the case-specific analysis required by *Halper*, "the character of the actual sanctions" (490 U.S. at 447) in this case makes clear that petitioners suffered punishment in the civil proceedings. The Comptroller made his initial penalty assessments only after determining — in accordance with the CMP Matrix — that petitioners had acted "willfully"; that they had received a prior warning; that they had engaged in repeated similar violations; that they had caused a large actual or potential loss; that they had "purposely complicated [the] transaction[s] to make [them]

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[12] The Occupational Safety and Health Act (29 U.S.C. § 651 *et seq.*) authorizes imposition of civil penalties upon essentially identical considerations (see *id.* § 666(a)). And as the Seventh Circuit recently held: "[a] fine thus derived is not 'related to the goal of making the government whole.'" *S.A. Healy Co.* v. *OSHRC*, 96 F.3d 906, 910 (1996), pet. for cert. pending, No. 96-1299.

difficult to uncover"; that they had failed to make restitution; that they had acted intentionally and not in good faith; and that they had offered virtually no cooperation. Ex. 4. As noted above (*supra* at 23-24), these are some of the most basic factors in determining punishment.[13] By contrast, the Comptroller gave no apparent consideration to the losses (if any) sustained by the government. That factor was never even mentioned.

But there is more. Petitioners were not simply sanctioned monetarily; they were also banned from the banking profession. This "prohibit[ion] [on] further participation" (Pet. App. 99a, 109a, 119a) was all the "specific deterrence" the agency could ask for; without the agency's "prior written consent" (*id.* at 131a) none of the petitioners could work in the industry at all, much less commit any new violations. Thus, so far as specific deterrence is concerned, the money penalties were utterly superfluous. Their imposition could have no purpose other than to exact retribution from petitioners and to deter others by example. That is the very essence of punishment.

On this record, it cannot plausibly be said, in the words of *Halper*, that the sanctions were designed "*solely* to serve a remedial purpose." 490 U.S. at 448 (emphasis added). Indeed, there is nothing in the record to suggest that the civil money sanctions imposed on petitioners had *any* remedial purpose. At a minimum, however, the money penalties, imposed on top of the lifetime debarments, served, at least in part, "retributive or deterrent purposes," and was therefore "punishment, as we have come to understand the term." *Ibid.*

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[13] In addition to the authorities cited at page 24 *supra*, see also *Roberts* v. *United States*, 445 U.S. 552, 557 (1980) (failure to cooperate and efforts at concealment may be considered in setting the level of punishment).

3. Even if the government's enforcement costs happen to approximate the money penalties ultimately imposed in this case, that would not render the civil sanctions "remedial" for double jeopardy purposes

The court of appeals rejected petitioners' double jeopardy challenge because, in its view (Pet. App. 4a), the civil sanctions bore "a rational relation to the goal of compensating the government for its loss." In particular, the court observed (*ibid.*), "there was no gross disproportionality between the total fines imposed, $44,000, and the proven damages to the government, $72,000." The court therefore concluded (*id.* at 6a) that "the sanctions can 'fairly be characterized as remedial.'" The court's analysis is flawed at every turn.

a. In the first place, the court misunderstood what it means to be "remedial." As Judge Easterbrook explained in *S.A. Healy Co.* v. *OSHRC*, 96 F.3d 906, 910 (7th Cir. 1996) (emphasis in the original), simply recovering investigative and enforcement costs "cannot be *remedial*, because the United States is not the injured party, and the fine produces no benefit for those who were injured — except through general and specific deterrence, the standard objectives of the criminal law." A "remedial" monetary sanction, by contrast, is one that compensates a victim for injury caused by the defendant's unlawful conduct. It is imposed for the purpose of restoring the victim to the position he would have occupied had the improper conduct not occurred — or, put another way, for the purpose of making the victim whole. See *Halper*, 490 U.S. at 449 (noting the "remedial purpose" of "a civil sanction" of "making the Government whole" in a case in which the Government was the injured party). Cf. *Milliken* v. *Bradley*, 418 U.S. 717, 746 (1974) (an injunctive decree is "remedial in nature" if it is "designed as nearly as possible 'to restore the victims of [unlawful] conduct to the position they would have occupied in the absence of such conduct'"). In this case, the government's expenditure on law enforcement is not an

injury against which the underlying statute is designed to protect and the sanctions imposed for its violation accordingly cannot be viewed as "remedial." Cf. *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7, 9-10 (1940) (sanctions imposed "for the purpose of redressing, not an injury to [the persons harmed by defendant's wrongful conduct], but an injury to the public" are punitive, not remedial).

The notion that it is "remedial" and not "punitive" to shift to the alleged offender the government's enforcement costs is also inconsistent with our common law traditions. "[T]he underlying rationale of fee-shifting is, of course, punitive." *Hall* v. *Cole*, 412 U.S. 1, 5 (1973). As the Court explained in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), parties in this country are usually expected to bear their own costs and attorneys' fees in litigating a matter. In the absence of a statute that makes "specific and explicit provision[] for the allowance of attorneys' fees" (*id.* at 260), the "American Rule" permits fee-shifting only for punitive purposes: "for the 'willful disobedience of a court order . . . as part of the fine to be levied on the defendant'"; and "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons'" (*id.* at 258-259). See also *Chambers* v. *Nasco*, 501 U.S. 32, 53-54 (1991). It would be an abrupt departure from this common law tradition to treat as "remedial" a money penalty scheme whose only evident "remedy" is to reimburse the government for the cost of litigating the case. Cf. *Isbandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952) ("[s]tatutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident").

To be sure, this Court has stated that money penalties may be remedial even when a *portion* of the recovery serves to reimburse the government for its "*ancillary* costs, such as the costs of detection and investigation, that routinely attend

the Government's efforts to root out deceptive practices directed at the public purse." *Halper*, 490 U.S. at 445 (emphasis added). But this case does not involve "practices directed at the public purse" (see *S.A. Healy*, 96 F.3d at 909-910), nor is there anything "ancillary" about the government's costs in this case. On this record, it is extremely doubtful that the government may be said to have proven *any* "loss." Assuming that it did, however, the government assuredly proved no loss *other* than the cost of investigation. Yet in each and every case in which this Court has sustained a civil sanction as "remedial," it did so *only* after first concluding that the sanction was designed, in the words of the *Hess* case, to "afford the government complete indemnity for the injuries done it." 317 U.S. at 549. See also *Mitchell*, 303 U.S. at 410; *Rex Trailer*, 350 U.S. at 153. Conversely, the Court has never, to our knowledge, sustained as "remedial" a sanction that did not actually "remedy" a harm to the government, but merely covered the costs of investigating *harms caused to other parties*. Such investigations, the Court observed in *Hess*, are "intended to * * * to vindicate public justice," and as such "subject the defendant to 'jeopardy' within the constitutional meaning." *Id.* at 549.

Moreover, treating money penalties as non-punitive simply because they do not exceed the government's enforcement costs proves too much. Even fines imposed in criminal cases may be (and frequently are) lower than the costs incurred by the government in investigating and prosecuting the case. This is often true where a "small-gauge offender" (*Halper*, 490 U.S. at 449) has become embroiled in a major criminal investigation, and the government's costs therefore vastly exceed the fines that are ultimately imposed on the individual defendant. But simply because those fines do not exceed the government's costs (however calibrated) cannot possibly alter the punitive nature of the fine. As Judge Easterbrook put the matter in *S.A. Healy* (96 F.3d at 910): "If we were to treat deterrence (and the costs of achieving it) as

'remedial,' then the entire criminal apparatus would be remedial."

Finally, courts have no basis for treating as "damages" to the government the payment of salaries that the government is contractually bound as an employer to pay in any event. Cf. Restatement of the Law (Second) Contracts § 73 (1981) ("[p]erformance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration"). As the facts of this case make clear, such a measure of "damage" positively invites unprincipled, after-the-fact manipulation. The Ninth Circuit's decision in *United States* v. *Walker*, 940 F.2d 442 (1991), illustrates the arbitrariness inherent in this approach. The defendant in that case entered the United States without declaring that he was in possession of one gram of marijuana. For this offense he was fined $500 by the Customs Service and was thereafter indicted for marijuana possession. The panel majority rejected the defendant's double jeopardy claim, taking "judicial notice" of the costs to the government "associated with maintaining check points and administering the customs system." *Id.* at 444. Dissenting, Judge Noonan asked (*ibid.*):

> [W]hy should a *pro rata* share of the customs inspection system be a measure? There would be no customs inspection system without the Department of the Treasury. Should not a *pro rata* share of Treasury expense be the measure? There would be no Treasury without the government as a whole. Should not a *pro rata* share of the expense of the government as a whole be the measure?

b. But even if it were "remedial" simply to reimburse the government for its investigative costs, there is absolutely no evidence to suggest that "the goal" (Pet. App. 4a) of the sanctions in this case was to do so. To the contrary, every indication — from the text of the statute, from its legislative history, and from the actual enforcement proceedings in this

case — confirms that the money penalties were intended solely to deter other potential offenders and to provide retribution. And "it is the purposes *actually served* by the sanction in question * * * that must be evaluated" (*Halper*, 490 U.S. at 447 n.7 (emphasis added)), not some rationalization that a prosecutor invents after the fact. Only by assessing "the purposes that the penalty may *fairly be said to serve*" can courts make "the determination whether a given civil sanction constitutes punishment in the relevant sense" (*id.* at 448 (emphasis added)).

Were the rule otherwise, there would not be "much left of the double jeopardy clause." *S.A. Healy Co.*, 96 F.3d at 910. As Judge Easterbrook observed in rejecting the contention that covering investigative costs is "remedial" for double jeopardy purposes (*ibid.*):

> Additional federal agencies furthering their own agendas may conduct their own investigations. The multiplying costs of the investigations become the justification for still more proceedings and the imposition of additional fines. [Petitioners] could be dogged for eternity by additional penalties for the same misconduct. This the double jeopardy clause does not allow.

The present case illustrates the vagaries that the court of appeals' ruling would permit. The "goal" of compensating the government for its investigative costs was the furthest thing from the agency's mind when it imposed the sanctions in this case. Indeed, Daniel Stipano, the Assistant Director of the Enforcement and Compliance Division of the OCC, acknowledged that the agency made its initial penalty assessment of $100,000 for Hudson and $50,000 for Rackley and Baresel — which turned out to be exactly the assessments that the agency ultimately recommended — *before most of the investigative and enforcement costs were even incurred.* Pet. App. 40a-42a. The costs could not and did not enter into the analysis. And the decision to settle the case on reduced terms

was "primar[il]y" due, not to cost factors, but for a reason that traditionally affects the level of criminal fines: Petitioners simply "had no money." *Id.* at 31a-32a.

So far from his mind was any concern over government costs that Stipano conceded he had no idea why he had even been asked to compile the data regarding the government's costs. Pet. App. 38a. And none of the criteria by which the fine was calculated had anything to do with the government's costs. Even the after-the-fact calculations of government "costs" were largely contrived — essentially a loose amalgam of fractions of annual salaries, with a dash of "benefits" such as "health care" thrown in. Pet. App. 40a. It trivializes this Court's double jeopardy jurisprudence to suggest that the constitutional guarantee against multiple punishments may be rendered ineffectual by such minutia.

The short of the matter is this: The money penalties in this case were designed only for deterrence and retribution, "the two primary objectives of criminal punishment." *Kansas* v. *Hendricks*, slip op. 14. The government decided to impose the penalties only after making findings of willfulness, concealment, and wrongdoing that are the very hallmarks of punishment. See *S.A. Healy*, 96 F.3d at 910-911. Conversely, the goal of reimbursing the government for its costs — which is not a "remedial" goal in any event — never entered the agency's mind. Neither was it any part of the congressional design in enacting the money penalty provisions. Taken as a whole, the civil sanctions in this case — the imposition of money penalties, plus a lifetime bar from participating in insured banking institutions — easily qualifies as punishment for double jeopardy purposes.

B. For Purposes Of The Double Jeopardy Clause, It Does Not Matter That Petitioners Were Subject To Civil Sanctions Before They Were Subject To Criminal Prosecution, Rather Than Vice Versa

The government contended in its Response to the Petition (at 13 & n.4) that the protections of the Double Jeopardy Clause "may not properly be invoked by a defendant who merely claims that he was previously subjected to a punitive *civil* sanction." In the government's view, "a purportedly punitive civil sanction" simply may not "bar a subsequent criminal prosecution or punishment." *Id.* at 13. Accordingly, because petitioners suffered the civil sanctions first and the prosecution second — rather than the other way around — the government would deny them the protections of the Double Jeopardy Clause.

This contention, which the government did not raise below, makes no sense at all. By its terms, the Double Jeopardy Clause is violated when a person is "twice put in jeopardy." If, as *Halper* and *Kurth Ranch* held, a civil sanction imposed *after* a criminal sanction can violate the Doubler Jeopardy Clause, that can only be because the civil proceeding constitutes a second — *i.e.*, a "double" — jeopardy. Accordingly, as Justice Scalia noted in his dissent in *Kurth Ranch*, "if there is a constitutional prohibition on multiple punishments, the order of punishment cannot possibly make any difference." 511 U.S. at 803. See also *Ursery*, 116 S. Ct. at 2161 (Stevens, J., concurring in the judgment in part and dissenting in part). To our knowledge, every circuit to have addressed this issue has reached the same conclusion.[14]

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[14] See, *e.g.*, *United States* v. *Stoller*, 78 F.3d 710, 717 (1st Cir.) ("as long as a civil sanction constitutes punishment in the relevant sense, it does not matter if the 'multiple' punishment — presumably a criminal sentence — precedes the attempt to impose the sanction, or conversely, if the sanction precedes the attempt to

Neither *Halper*, *Kurth Ranch*, nor any other decision of this Court contains a trace of the government's theory — that there is a "double" jeopardy only when the prosecution comes first. To be sure, the Court stated in *Halper* (490 U.S. at 448-449) "that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." But that was simply a statement of the facts of *Halper*; there is no indication whatsoever that the Court was suggesting that double jeopardy protections apply *only* when the prosecution comes first. After all, if an *initial* civil proceeding cannot pose a *single* jeopardy, how can a *subsequent* civil action ever present a *double* jeopardy?

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convict the defendant"), cert. dismissed, 117 S. Ct. 378 (1996); *United States* v. *Sanchez-Esacareno*, 950 F.2d 193, 200 (5th Cir. 1991) ("the order of proceedings matters not to the analysis; the *Halper* principle that a civil penalty can be factored into the double jeopardy matrix should apply whether the civil penalty precedes or follows the criminal proceeding"), cert. denied, 506 U.S. 841 (1992); *United States* v. *Mayes*, 897 F.2d 1126, 1127 (11th Cir.) ("the *Halper* principle that civil penalties can sometimes constitute criminal punishment for double jeopardy purposes would seem to apply whether the civil penalties come before or after the criminal indictment"), cert. denied, 498 U.S. 865 (1990); *United States* v. *Morgan*, 51 F.3d 1105 (2d Cir.), cert. denied, 116 S. Ct. 171 (1995); *United States* v. *Williams*, 56 F.3d 63 (4th Cir. 1995); *United States* v. *Tilley*, 18 F.3d 295, 298 n.5 (5th Cir.), cert. denied, 513 U.S. 1015 (1994); *United States* v. *Austin*, 54 F.3d 394, 399 (7th Cir. 1995); *United States* v. *Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990). But cf. *United States* v. *Newby*, 11 F.3d 1143, 1145 (3d Cir. 1993) (suggesting, without deciding, that a case in which the civil penalty preceded the criminal penalty might be distinguishable from *Halper*).

Kurth Ranch also significantly undercuts the government's "order is everything" theory. 511 U.S. 767. In that case, the Court invalidated, on double jeopardy grounds, a Montana tax on the possession of illegal drugs that followed upon a criminal penalty for drug offenses. As in *Halper*, the civil sanction happened to follow the criminal penalty; but nowhere did the Court place any weight on that fact. To the contrary, the Court focused on the features of the tax proceeding itself and concluded (*id.* at 784) that the proceeding was "the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time 'for the same offense.'" If anything, then, *Kurth Ranch* sets forth precisely the proposition the government denies: that, when the government seeks and obtains a civil sanction, the defendant may be placed in "jeopardy" sufficient to trigger double jeopardy protections.

In short, *Halper* and *Kurth Ranch* stand for the proposition that, under appropriate circumstances (490 U.S. at 449), a civil sanction may give rise to jeopardy. Whether it comes first or second cannot possibly make a constitutional difference.[15]

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[15] Ironically, the government itself has recognized the same point. In its amicus brief in *United States ex rel. Marcus* v. *Hess*, Nos. 173, 236 (Oct. Term 1942), the government urged this Court to conclude that a civil false claims action and a criminal action are different offenses for double jeopardy purposes. A contrary ruling, the government explained, "might entail severe and unfortunate consequences" for "the enforcement of the criminal law by public officials." Am. Br. 48. This was so, the government continued, because "the principle of double jeopardy works both ways. If the suit for penalties is regarded as sufficiently punitive to be barred by prior criminal proceedings, *a criminal prosecution would be barred if the penalty suit were brought first.*" *Ibid* (emphasis added). We agree with Solicitor General Fahy.

C. Petitioners Are In Jeopardy Of Being Punished Twice For "The Same Offense"

Finally, the government asserted in its Response to the Petition (at 14 & n.5) that under the "'elements test'" set forth in this Court's decision in *Blockburger* v. *United States*, 284 U.S. 299 (1932), "the banking violations that formed the basis for the sanctions assessed against petitioners are not 'the same' as the offenses charged in the indictment — conspiracy, misapplication of bank funds, and making false entries." In particular, the government stated, "[e]ach of the criminal offenses requires proof of (at least) one element not required by the civil charges, and vice versa."

For two independent reasons, that contention is incorrect. First, this Court's double jeopardy cases involving consecutive civil and criminal proceedings have stated, not the "elements test" under *Blockburger*, but rather a "same conduct" formulation. In fact, several of those cases would not likely have come out as they did had a strict elements test been applied. Under a "same conduct" test, the indictment charges petitioners with the same offenses for which they were sanctioned in the civil proceedings.

In any event, even if *Blockburger* controls, the misapplication and conspiracy offenses in the indictment are the same as those for which petitioners were civilly sanctioned. Under this Court's cases, the elements test under *Blockburger* must focus on the government's actual proceedings against petitioners, not the proceedings that it could, as a theoretical matter, have pursued. Here, the elements underlying the judgment in the civil case, and essential to the sanctions that were imposed on petitioners, were entirely sufficient to prove all but the false entry charges as well.

1. This Court has articulated a "same conduct" (not "same elements") standard in double jeopardy cases arising from consecutive civil and criminal proceedings

a. The Court's cases involving consecutive civil and criminal proceedings do not support the government's contention that *Blockburger* controls the question whether the "same offense" is being twice punished. To the contrary, the Court has articulated a "same conduct" or "same transaction" standard in describing offenses such as those here at issue.

Thus, for example, in stating the implications of its holding in *Halper*, the Court explained (490 U.S. at 451) (emphasis added): "[T]he only proscription established by our ruling is that the Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action *based on the same conduct* and receive a judgment that is not rationally related to the goal of making the Government whole." Indeed, each time the Court described the separate proceedings in *Halper* it did so using the formulation "same conduct." See *id.* at 441 (the parties do not "dispute that the instant proceeding and the prior criminal proceeding concern the same conduct, the submission of 65 false claims"); *id.* at 450 ("Nothing in today's ruling precludes the Government from seeking the full civil penalty against a defendant who previously has not been punished for the same conduct, even if the civil sanction imposed is punitive").

In *Kurth Ranch*, the Court reiterated that formulation. In stating the question presented at the outset of the decision, the Court said (511 U.S. at 769) (emphasis added): "This case presents the question whether a tax on the possession of illegal drugs assessed after the State has imposed a criminal penalty *for the same conduct* may violate the constitutional prohibition against successive punishments for the same offense."

The Court used much the same formulation in *United States* v. *La Franca*, 282 U.S. 568 (1931), a unanimous

decision that was handed down only one year before *Blockburger* itself. The question in *La Franca* was whether a federal statute should be construed to permit the government to sue to collect taxes and penalties on the sale of alcoholic beverages, following the defendant's conviction for having made the same sales. The Court construed the statute to prohibit the lawsuit. In doing so, however, the Court made clear that its construction was virtually compelled by double jeopardy principles. The Court framed the question presented in these terms (*id.* at 573) (emphasis added):

> Respondent already had been convicted and punished in a criminal prosecution *for the identical transactions set forth as a basis for recovery in the present action.* He could not again, of course, have been prosecuted criminally for the same *acts*. Does the fact that the second case is a civil action, under the circumstances here disclosed, alter the rule?

The Court concluded that the nominally civil nature of the proceeding did not alter the "essential nature" of the tax as punitive. Because the tax proceeding and the prior prosecution involved "the same acts," the Court felt constrained to interpret the statute to preclude the tax proceeding.

b. Nor would the Court's articulation of a "same conduct or transaction" standard appear to be inconsequential. In reaching its decision in *La Franca*, the Court relied prominently (282 U.S. at 574) on Circuit Justice Miller's decision in *United States* v. *McKee*, 26 F. Cas. 1116 (Circuit Ct. E.D. Mo. 1877). In *McKee* the Circuit Court held that the Double Jeopardy Clause barred a civil action to recover double the amount of taxes of which the government had been defrauded through defendant's aiding and abetting, following the defendant's conviction for conspiracy to defraud the United States. Strictly speaking, of course, conspiracy and aiding and abetting are distinct offenses; yet, taking a

functional approach, the Court held that conspiring to defraud the government is one of the "the safest and surest means" of aiding and abetting the result. Thus, the Court concluded (*id.* at 1117), "if the specific acts * * * on which this suit is brought are the same which were proved in the indictment, the former judgment and conviction is a bar to the present action." Moreover, in describing the holding in *McKee*, the Court in *La Franca* stated that double jeopardy principles had been applied in that case because "the transactions" in both the civil and criminal proceedings had been "the same." 282 U.S. at 574.

The same holds true of *Halper*. The defendant in that case was convicted under the criminal false claims statute (18 U.S.C. § 287) and thereafter sued under section (a)(2) of the civil false claims statute (31 U.S.C. § 3729(a)(2)). To prove a criminal violation, the government was required to show that the defendant: (1) presented a false or fraudulent claim to any agency of the United States; and (2) knew such claim to be false or fraudulent. See, *e.g.*, *United States* v. *Ewing*, 957 F.2d 115, 119 (4th Cir. 1992), cert. denied 505 U.S. 1210. Thus, the criminal statute required the government to demonstrate that the defendant himself, or someone whose actions could be attributed to the defendant, submitted the false claim. The plain language of 31 U.S.C. § 3729(a)(2), the civil statute, would not appear to demand such a showing. To prove a civil violation, the government must establish (1) that the defendant made or used, or caused to be made or used, a record or statement to get a claim against the United States paid or approved; (2) that the record or statement and the claim that it supported were both false or fraudulent; (3) that the defendant knew the record or statement and the claim it supported were false or fraudulent; and (4) that the United States suffered damages as a result of the false or fraudulent claim. See *Blusal Meats, Inc.* v. *United States*, 638 F. Supp. 824, 827 (S.D.N.Y. 1986). A defendant violates the civil statute by knowingly preparing false supporting materials,

even if the defendant himself did not submit the false claim. The criminal provision does not require the defendant to have prepared the false record or statement. In short, each statute would appear, strictly speaking, to require proof of at least one element that the other does not.

The statutes in *Kurth Ranch* would also have failed to meet a strict "elements test." The defendants in that case pleaded guilty to and were punished for conspiracy to possess drugs with the intent to sell under MONT. CODE ANN. § 45-4-102 (1987). See *Department of Revenue of Montana* v. *Kurth Ranch*, 511 U.S. 767, 772 n.9 (1994). In order to establish conspiracy under the Montana statute, the prosecutor had to show: (1) that the defendants made a knowing and purposeful agreement to commit a criminal offense; and (2) an act in furtherance of such agreement. See *State* v. *Houchin*, 235 Mont. 179, 181, 765 P.2d 178, 179 (1988). Subsequent to the plea bargain, the Department of Revenue attempted to tax the Kurth family under MONT. CODE ANN. § 15-25-101 *et seq.* (1987), which allowed the state to assess a tax against any person who (1) possessed (2) dangerous drugs. The tax statute required possession; the criminal conspiracy charge did not require that the defendants actually fulfill any of the underlying elements, such as possession, of the crime that they conspired to commit. See *Houchin*, 235 Mont. at 181, 765 P.2d at 179. The criminal statute required an agreement; the tax statute did not. The Court nevertheless held that double jeopardy barred the tax penalty.

Indeed, even when explicitly given the opportunity, the Court has declined to embrace an "elements test" in the context of consecutive civil and criminal proceedings. In *Hess*, the district court had rejected a double jeopardy claim on the ground that the prior criminal conviction had been on a charge of conspiring to defraud the United States, while the *qui tam* action alleged the substantive presentation of false claims. 41 F. Supp. 197, 210 (W.D.Pa. 1941). The Solicitor General urged this Court to affirm the judgment on that basis,

expressing concern that the Court would otherwise have to reach the "close" question whether damages awarded in a *qui tam* action are punitive in nature. U.S. Br. 59. This Court, however, did not accept the government's suggestion. To the contrary, in introducing the double jeopardy issue, the Court stated (317 U.S. at 548 (emphasis added)): "[R]espondents had previously been indicted and fined for defrauding the government in connection with *the same transactions* for which they are now being sued." The Court went on to hold that the *qui tam* action was remedial in nature.

2. In any event, even if *Blockburger* controls, the misapplication and conspiracy counts should be dismissed because they rest on the same elements that the government established in imposing the civil sanctions in this case

Even if *Blockburger* is the correct test in this context, the misapplication and conspiracy counts constitute the same offenses as those for which petitioners were already civilly sanctioned. In particular, the elements established by the government (on consent) in the civil proceedings were entirely sufficient to prove the misapplication and conspiracy charges as well.[16] True, the banking statutes do not *invariably* require proof of the same elements as do the criminal statutes. But in the circumstances of this particular case, the civil sanctions in fact rested on the same elements (not merely the same conduct) as the government would have to prove in the criminal case. And this Court's cases confirm that it is

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[16] It has been established since *United States* v. *Chouteau*, 102 U.S. 603 (1880), that a consent decree, or similar document, will support a claim of double jeopardy: "The compromise pleaded must operate for the protection of the [defendant] against subsequent proceedings as fully as a former conviction or acquittal." *Id.* at 611.

entirely appropriate to apply the *Blockburger* analysis at this "retail" level.

For example, in *Whalen* v. *United* States, 445 U.S. 684 (1980), the Court held that, under *Blockburger*, a defendant could not be separately punished for rape and for a felony murder based on killing the same victim in the perpetration of the rape. The government argued that the greater offense (there, felony murder) "does not in all cases require proof" of the lesser offense (there, rape); for example, the government noted, the predicate offense could just as easily have been robbery, kidnapping, or arson. *Id.* at 694. The Court rejected that argument. "*In the present case*," the Court explained, "proof of rape is a necessary element of proof of the felony murder, and we are unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense." *Ibid.* (emphasis added).

The Court applied the same principle in *Illinois* v. *Vitale*, 447 U.S. 410 (1980). The question in *Vitale* was whether, under the Double Jeopardy Clause, a defendant's conviction for failing to reduce speed to avoid a collision precluded the State from prosecuting him for involuntary manslaughter arising from an automobile accident. The Court analyzed the question by focusing on the State's actual trial theory — not what elements the State *theoretically could* prove at a manslaughter trial, but what elements it *actually would* prove at *this defendant's* trial. See *id.* at 420. See also *Brown* v. *Ohio*, 432 U.S. 161 (1976); *Harris* v. *Oklahoma*, 433 U.S. 682 (1977).[17]

---

[17] See also *United States* v. *Dixon*, 509 U.S. 688, 696-700 (1993) (Scalia, J., joined by Kennedy, J.) (where contempt sanction was based on violating the terms of a conditional release, and those terms prohibited violating any criminal law, defendant could not subsequently be prosecuted for violating the drug offense on which the contempt sanction has been based); *Payne* v. *Virginia*, 468 U.S. 1062 (1984) (conviction for robbery was barred under Double Jeopardy Clause where it followed conviction for capital murder committed during the perpetration of an armed robbery).

In the present case, the government sanctioned petitioners under 12 U.S.C. §§ 93(b) and 504 for violations of 12 U.S.C. § 84 (involving unsecured loans to any one borrower) and 12 U.S.C. § 375b (involving loans to insiders). The elements actually established (on consent) were that petitioners, as officers or directors of national and Federal Reserve member banks, intentionally engaged in a series of nominee loans, that they did so with a "willful and continuing disregard for [the] safety and soundness" of the banks, and that they "purposely complicated [the] transaction[s] to make [them] more difficult to uncover." See Ex. 4; J.A. 39; Pet. App. 118a. Those elements are entirely sufficient to establish misapplication under 18 U.S.C. § 656. To make its case under the Section 656 counts, the government would be required to prove, albeit beyond a reasonable doubt, exactly the same elements: (1) that the defendants were officers or directors of a federally insured or protected bank; (2) that they willfully misapplied the funds of the bank; and (3) that they did so with the intent to defraud the bank. See *e.g.*, *United States* v. *Haddock*, 961 F.2d 933, 934-935 (10th Cir.), cert. denied, 113 S. Ct. 88 (1992). See also U.S. Ct. App. Br. at 21-22. There is no meaningful difference between the two sets of elements; to prove the first set (if done beyond a reasonable doubt) is necessarily to prove the second. Accordingly, the misapplication charges (Counts 2-7, 9-18, 20-22) were properly dismissed by the district court.

So, too, was the conspiracy charge (Count 1). To make out a charge of conspiracy under 18 U.S.C. § 371, the government would have to prove that petitioners agreed to commit the object offenses (here, misapplication of funds or making false bank entries) and that one or more of them

committed an overt act in furtherance of that agreement. Again, the elements underlying the civil sanctions establish the elements of conspiracy. A "violation" under the money penalty provisions "includes without limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation." 12 U.S.C. 93(b)(1), 504. By their terms, then, Sections 93(b)(1) and 504 cover agreements (a type of "action * * * with another") for the purpose of "causing" or "bringing" about a violation of 12 U.S.C. 84 and 375b. In short, the banking provisions overlap with the conspiracy elements, just as they overlap with the substantive misapplication charge.[18]

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[18] The two remaining charges (Counts 8 and 19) allege that petitioner Rackley caused false entries to be made in certain bank records, in violation of 18 U.S.C. § 1005. If the Court accepts the "same offense or transaction" standard, these counts should also be dismissed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

C. MERLE GILE
2200 N. Classen Boulevard
2000 Citizen's Tower
Oklahoma City, OK 73106

JAMES A. ROLFE
2821 Routh Street
Dallas, TX 75201

LYNN PRINGLE
Pringle & Pringle
4101 N. Classen Boulevard
Oklahoma City, OK 73118

JACK L. NEVILLE, JR.
BERNARD J. ROTHBAUM*
LINN & NEVILLE, P.C.
1200 Bank of Oklahoma Plaza
201 Robert S. Kerr Avenue
Oklahoma City, OK 73102
(405) 239-6781
Counsel for Petitioners

LAWRENCE S. ROBBINS
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

JUNE 1997

Supreme Court, U.S.
FILED
AUG 26 1997
CLERK

No. 96-976

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOHN HUDSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
PAUL R.Q. WOLFSON
Assistant to the Solicitor General
J. DOUGLAS WILSON
JARED A. GOLDSTEIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

73 pp

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars petitioners' criminal prosecution on charges of conspiracy, misapplication of bank funds, and making false banking entries because they previously paid $44,000 in civil penalties assessed by the Comptroller of the Currency based on the same underlying conduct.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 92 F.3d 1026. The order of the district court dismissing the indictment (Pet. App. 9a-14a) is reported at 879 F. Supp. 1113. A prior opinion of the court of appeals (Pet. App. 69a-81a) is reported at 14 F.3d 536. A prior opinion of the district court (Pet. App. 82a-88a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1996. A petition for rehearing was denied on September 20, 1996. Pet. App. 18a-19a. The petition for a writ of certiorari was filed on December 17, 1996, and was granted by the Court on April 14, 1997. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." Pertinent parts of the versions of 12 U.S.C. 84, 93, 375b, and 504 (1982) in effect at the time of petitioners' conduct, and of the versions of 12 C.F.R. 31.2 and 215.4 (1986) in effect at that time, are reproduced in the appendix to this brief. The provisions of 18 U.S.C. 371, 656, and 1005 (1994) under which petitioners have been indicted are also reprinted in that appendix.

STATEMENT

On August 25, 1992, petitioners John Hudson, Larry Baresel, and Jack Rackley were indicted in the United States District Court for the Western District of Oklahoma on one count of conspiracy to misapply bank funds and to make false banking entries, in violation of 18 U.S.C. 371. J.A. 9-17. In addition, the grand jury charged Hudson with 19 counts, Baresel with 15 counts, and Rackley with 17 counts of misapplication of bank funds, in violation of 18 U.S.C. 656 and 2; Rackley was also charged with two counts of making a false banking entry, in violation of 18 U.S.C. 1005. J.A. 17-38. Before trial, petitioners moved to dismiss the indictment on double jeopardy grounds. The district court initially denied the motion, Pet. App. 82a-88a, but the court of appeals reversed in part and remanded for further proceedings, *id.* at 69a-81a. On remand, the district court granted petitioners' motion to dismiss the indictment. *Id.* at 9a-14a. The court of appeals reversed. *Id.* at 1a-8a.

1. In 1986 and 1987, petitioner Hudson was the majority owner of five banks in Oklahoma, including the First National Bank of Tipton, Oklahoma, and the First National Bank of Hammon, Oklahoma. During approxi-

mately the same time, petitioner Baresel was a member of the boards of directors of the Tipton and Hammon banks, and petitioner Rackley was the president of the Tipton bank and a member of the board of directors of the Hammon bank. Pet. App. 89a-90a.

Examination and investigation of the Tipton and Hammon banks led the Office of Comptroller of the Currency (OCC) to conclude that petitioners had used their bank positions to arrange a series of bank loans to Hudson, in violation of statutes and OCC regulations restricting loans to bank insiders and imposing lending limits on loans to any one borrower.[1] OCC concluded that loans extended by the Tipton and Hammon banks nominally to third parties were in reality made to Hudson. The loans were made to enable Hudson to redeem bank stock that he had pledged as collateral on defaulted loans, and thereby to retain control of the banks. Pet. App. 90a-97a.

On February 13, 1989, OCC issued a "Notice of Assessment of a Civil Money Penalty" against petitioners. The Notice alleged that petitioners had violated 12 U.S.C. 84 and 375b and 12 C.F.R. 31.2(b) and 215.4(b) by causing the banks with which they were associated to make loans to nominee borrowers in a manner that unlawfully allowed petitioner Hudson to receive the benefit of the loans. Pet. App. 92a-93a, 94a-95a. The Notice also alleged that the nominee loans resulted in losses to the Tipton and Hammon banks of almost $900,000 and contributed to their

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[1] As pertinent here, 12 U.S.C. 84(a)(1) (1982) generally prohibited banks from extending to any one borrower unsecured loans exceeding 15% of the bank's unimpaired capital and surplus. 12 U.S.C. 375b(2) (1982) prohibited a bank from extending a loan to any of its officers or directors above lending limits set by regulation without prior approval of the bank's board of directors. Regulations of the Comptroller and the Board of Governors of the Federal Reserve System provided that loans to a bank's insiders exceeding 5% of the bank's capital and surplus required prior bank board approval. 12 C.F.R. 31.2, 215.4 (1986).

failures. *Id.* at 97a. "After taking into account the size of the financial resources and the good faith of [petitioners], the gravity of the violations, the history of previous violations and other matters as justice may require, as required by 12 U.S.C. §§ 93(b)(2) and 504(b)," OCC assessed penalties of $100,000 against Hudson and $50,000 each against Baresel and Rackley. *Id.* at 89a.

On August 31, 1989, OCC issued a "Notice of Intention to Prohibit Further Participation" against each petitioner. OCC informed petitioners of its intention to bar them from further participation in the conduct of any federally insured bank, based on the same series of nominee loans. Pet. App. 99a, 109a, 119a.

In late 1989, each petitioner resolved the proceedings initiated by the Notices filed by the Comptroller by entering into a "Stipulation and Consent Order." Pet. App. 129a-143a. In the consent orders, Hudson agreed to pay a $16,500 assessment, Baresel agreed to pay a $15,000 assessment, and Rackley agreed to pay a $12,500 assessment. *Id.* at 130a, 140a, 135a. Each petitioner also agreed not to participate in banking activities without the written authorization of the Comptroller and all other relevant regulatory agencies. *Id.* at 130a-131a, 136a-137a, 141a-142a.

2. In August 1992, petitioners were indicted in the Western District of Oklahoma on charges of conspiracy, misapplication of bank funds, and making false bank entries. The violations charged in the indictment rested on the same lending transactions that formed the basis for the prior administrative proceeding brought by OCC. Pet. App. 69a.

Petitioners moved to dismiss the indictment, arguing that their conviction on the charged offenses would result in multiple punishments, in violation of the Double Jeopardy Clause. The district court denied the motions. Pet. App. 82a-87a. The court of appeals, however, vacated

the district court's judgment in part and remanded for further proceedings to determine whether the civil money penalties assessed by OCC and settled by petitioners were punitive and therefore barred subsequent criminal punishment. *Id.* at 69a-81a. The court of appeals read *United States* v. *Halper*, 490 U.S. 435 (1989), and *Austin* v. *United States*, 509 U.S. 602 (1993), to hold that "if a sanction is not exclusively remedial, but rather can only be explained as also affecting deterrence or retribution, it is punishment for double jeopardy analysis" and therefore bars additional punishment. Pet. App. 75a. The district court was directed on remand to examine the purposes served by the civil money penalties imposed on petitioners, and the relation between the amount of the penalties and any injury sustained by the government. *Id.* at 79a-81a.[2]

3. On remand, the district court held an evidentiary hearing on the purposes served by the civil money penalties and their relation to the government's injury. Daniel Stipano, Assistant Director of the Enforcement and Compliance Division of OCC, testified that petitioners' conduct had caused a loss to the Federal Deposit Insurance Corporation (FDIC) Insurance Fund: OCC had directed the Tipton and Hammon banks to write off the Hudson-nominee loans because they had no value, and those losses (between $900,000 and $1 million), combined with other losses, rendered the banks insolvent and caused them to be placed in FDIC receivership. Because the banks' capital was depleted, the FDIC had to reach into the insurance fund to pay off depositors. Pet. App. 57a. Stipano also testified that OCC had expended about $72,000

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[2] The court of appeals itself concluded, however, that the administrative sanctions barring petitioners from participating in the affairs of a bank without OCC approval were remedial, not punitive, and therefore did not implicate the Double Jeopardy Clause at all. Pet. App. 75a-78a.

in investigation and enforcement costs in the civil case. He based that figure on his allocation of salary and benefits of OCC staff members who had investigated the Hudson-nominee loans. *Id.* at 39a-41a.

Stipano also explained that, under the relevant statute, "before we assess a civil money penalty, [OCC] is supposed to consider certain statutory factors. They cover things like the gravity of the violation, the history of previous violations, the financial resources of the individual, and other factors that justice may require." Pet. App. 27a-28a. The purpose of OCC's civil money penalties, Stipano further stated, is "to deter future violations of law or encourage the correction of existing violations." *Id.* at 36a. Stipano also testified that, at the time the civil penalties in this case were assessed, OCC's enforcement staff did not believe that OCC could order petitioners to make restitution to the banks. *Id.* at 33a. Stipano confirmed that, in assessing the penalties, he had used a "civil money penalty matrix" to evaluate 13 factors to suggest the monetary penalty that should be imposed. *Id.* at 55a; see J.A. 39.[3] Although that matrix suggested that a penalty of $100,000 against each petitioner was appropriate, see Pet. App. 55a-56a, OCC compromised the penalty in an amount less than that "proportionate to the harm,"

[3] The matrix was derived from an OCC policy statement concerning the assessment of civil money penalties. That statement in turn was derived from policies of the Federal Financial Institutions Examinations Council, which has established uniform policies for the assessment of civil penalties by all federal agencies with regulatory authority over banking and financial institutions. See Pet. App. 34a-35a. The policy statement relevant to this case was issued by OCC on January 28, 1988. That policy statement was introduced at the evidentiary hearing as Government Exhibit 21. Previous OCC policy statements were also introduced as exhibits at that hearing and are in the record.

primarily because of petitioners' limited ability to pay, *id.* at 31a-32a.

4. After the hearing, the district court dismissed the indictment. Pet. App. 9a-14a. The court first concluded that, "for double jeopardy purposes, the Consent Order[s] [that terminated the administrative proceeding] and the indictment involve the same conduct." *Id.* at 11a. The court reasoned that "[t]he broad range of conduct prohibited by 12 U.S.C. § 93(b) and § 504," the statutes authorizing OCC to assess monetary penalties, "necessarily encompasses the conduct which is the subject of 18 U.S.C. § 656," one of the three statutes under which petitioners were indicted. Pet. App. 12a.[4]

The court then considered whether "the punishment imposed under the civil penalty is sufficient to invoke double jeopardy protection against the subsequent indictment." Pet. App. 12a. "Double jeopardy," the court stated, "does not apply where the civil penalty at issue is *solely* remedial, but applies if that penalty is also partially designed to punish." *Ibid.* (citing *Austin*). The court concluded that the monetary sanctions imposed against petitioners were not "solely remedial." It explained that (a) Stipano testified that OCC had assessed a penalty against petitioners to deter future violations by others; (b) OCC's policy manual made clear that a civil money penalty can serve as a deterrent against similar violations by others; and (c) the civil money penalty matrix used to calculate the amount of the penalty included intent, number of violations, and concealment of violations as factors to be considered, but did not include injury to the government as such a factor. *Id.* at 13a-14a. The court

[4] The court did not separately state whether the prosecution or punishment of petitioners for conspiracy, under 18 U.S.C. 371, or making false banking entries, under 18 U.S.C. 1005, could also constitute double jeopardy as a second punishment for the same offense.

also stressed that OCC staff had not relied on the agency's investigative costs when it recommended the amount of the penalty to be assessed against petitioners. *Id.* at 14a. Because "[t]he evidence establishes that the OCC monetary assessments against [petitioners] were not solely remedial [but] * * * were at least partially designed to serve as a deterrent," the court found that the penalties "were punitive for double jeopardy purposes." *Ibid.*

5. The court of appeals reversed. Pet. App. 1a-8a. The court held that under the "objective test" outlined in *Halper*, *supra*, a civil assessment is not punishment "when it bears a rational relation to the goal of compensating the government for its loss." *Id.* at 4a. Here, the court held, "there was no gross disproportionality between the total fines imposed, $44,000, and the proven damages to the government, $72,000." *Ibid.*; see also *id.* at 6a ("the record in the case at bar simply does not suggest that the amount [petitioners] agreed to pay [the OCC] was overwhelmingly disproportionate to the damages [they] caused") (internal quotation marks omitted). Accordingly, the court concluded, the administrative sanctions "can fairly be characterized as remedial." *Ibid.* (internal quotation marks omitted).[5]

The court of appeals rejected the premise, on which the district court had relied, that the penalties were punitive because the "subjective intent" of the Comptroller in assessing them was to deter future violations. Pet. App. 6a. The court stated that the approach in *Halper* of comparing the amount of the penalty with the loss to the government "constitutes an objective rule that is grounded in the nature of the sanction and the facts of the particular case. It does not authorize courts to undertake a broad inquiry into the subjective purposes that may be thought to lie behind a given judicial proceeding." Pet. App. 6a (quoting *Halper*, 490 U.S. at 453 (Kennedy, J., concurring)). The court agreed with other appellate decisions that "merely because the [agency] did not consider the government's loss when imposing the fine does not imply that the fine is not related to the government's loss." *Id.* at 7a.[6]

[5] The court of appeals did not reach the government's argument that the penalties also served in part to remedy the $900,000 loss suffered by the Federal Deposit Insurance Fund.

SUMMARY OF ARGUMENT

A. Congress may ordinarily impose both a civil and a criminal sanction for the same underlying act without infringing the Double Jeopardy Clause. Where a civil money penalty qualifies as "punishment," however, the Double Jeopardy Clause bars its imposition following a criminal conviction for the same offense. *United States* v. *Halper*, 490 U.S. 435 (1989). *Halper* does not apply here. The civil money penalties previously imposed on petitioners for their banking violations constitute a nonpunitive, regulatory sanction. Accordingly, the subsequent prosecution of petitioners for crimes does not violate the Double Jeopardy Clause.

In *Halper*, the Court announced a rule for the "rare case," in which a fixed civil penalty designed to compensate the government for fraud produces, on particular facts, an "overwhelmingly disproportionate" sanction. 490 U.S. at 449. *Halper* does not apply to civil money penalties imposed for the purpose of inducing compliance with regulatory objectives. Civil money penalties assessed under a regulatory scheme aim to deter violations, and thereby to promote the public interest. The size of such penalties is calibrated to achieve their conduct-shaping

[6] Because the court found that civil penalties were not punishment, it declined to reach the government's argument that the violations for which the penalties were assessed did not involve the "same offense" as the criminal charges. Pet. App. 3a n.3.

purposes. The *Halper* test was not framed, and is not applicable, to such conduct-shaping sanctions. Twice since *Halper*, the Court has declined to apply that decision's test outside the context of a fixed penalty imposed for a compensatory purpose. *Department of Revenue* v. *Kurth Ranch*, 511 U.S. 767, 784 (1994); *United States* v. *Ursery*, 116 S. Ct. 2135, 2145 (1996). And *Ursery* concluded that *Halper*'s "case-specific approach [is] impossible to apply outside the context of a fixed civil-penalty provision." *Id.* at 2146.

The conduct-shaping, or deterrent, purpose of regulatory civil money penalties does not mark such sanctions as "punishment" under the Double Jeopardy Clause. This Court has recognized that deterrence is a legitimate, nonpunitive aim of civil sanctions. *Ursery*, 116 S. Ct. at 2148; *Kurth Ranch*, 511 U.S. at 779-780. Deterrence does not have a retributory, stigmatizing character that would qualify civil money penalties as punishment. For double jeopardy purposes, a regulatory civil monetary penalty is a legitimate, nonpunitive means of influencing conduct.

The long history of civil money penalties enacted for deterrent purposes, and the pervasive presence of such sanctions in the civil law today, buttresses that conclusion. A holding that a deterrent purpose characterizes such sanctions as "punitive" under the Double Jeopardy Clause would radically transform the enforcement of the law. The parallel pursuit of civil penalties and criminal prosecution is commonplace under federal regulatory schemes. If the Double Jeopardy Clause were held to require an election by the government between those approaches, the enforcement of the law would be seriously skewed and hampered.

The appropriate test to determine whether regulatory civil money penalties qualify as "punishment" for double jeopardy purposes inquires, first, whether Congress intended to impose a civil sanction, and, second, whether

the sanction is so punitive in purpose or effect as to negate Congress's intention to establish a civil regulatory scheme. See *Ursery*, 116 S. Ct. at 2147; *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980). Application of that test here establishes that civil money penalties imposed pursuant to regulatory schemes are, as a general matter, not punishment under the Double Jeopardy Clause. Accordingly, petitioners' prior payment of civil money penalties does not bar their prosecution.

B. Even if it were appropriate to apply *Halper*'s case-specific test to the civil money penalties in this case, that test would not assist petitioners. Under *Halper*'s test, a civil money penalty is punitive only if it is not rationally related to the harms caused by the underlying violation. Here, the $44,000 in civil penalties paid by petitioners is less than the government's costs of investigating their violations. Thus, the penalties are remedial within the meaning of *Halper*.

The government may recoup its investigative costs even though those costs were not a factor in assessing the level of civil money penalties. The *Halper* inquiry is an objective one, which turns on the government's actual costs. To disregard those costs would give petitioners a double-jeopardy windfall, for the actual penalty imposed in this case did nothing more than compensate the government for its harm. And the government is entitled to recoup its investigatory costs even if it was not a direct pecuniary victim of the violation. When the government must expend resources to detect regulatory violations and obtain compliance with regulatory standards, the government may seek a remedy that, by recovering its investigatory costs, makes itself whole.

C. The Double Jeopardy Clause is inapplicable here for a further reason: the constitutional requirement of a former "jeopardy" is not met by a prior civil money sanction. Rather, it is met only by a prior criminal prosecu-

tion. Because petitioners did not face prosecution in the civil money penalty proceeding, the Double Jeopardy Clause does not bar a criminal indictment.

Even if payment of a prior civil money penalty could support a double jeopardy claim under *Halper*, such a civil penalty should not lead to dismissal of a criminal indictment. A *Halper* claim involves a threat of multiple *punishments*, not successive *prosecutions*. Here, giving a defendant "credit" for his civil money penalty against any eventual criminal sentence adequately protects the defendant's interest in avoiding multiple punishment. At the same time, a credit approach vindicates society's compelling interest in having one opportunity to prosecute an individual for crimes.

D. Finally, petitioners' double jeopardy rights are not violated because the civil violations and criminal charges are not the "same offense." The determination of whether the two proceedings involve the "same offense" for purposes of the Double Jeopardy Clause is governed not by a "same conduct" or "same transaction" test, but by the test of *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). Under that test, two offenses are not the "same" if "each [offense] requires proof of a fact which the other does not." *Ibid.* Here, because all of the criminal provisions contain elements of proof beyond those required by the civil provisions, and *vice versa*, petitioners do not face multiple punishments for the "same offense."

ARGUMENT

THE DOUBLE JEOPARDY CLAUSE DOES NOT BAR PETITIONERS' PROSECUTION FOR CRIMES ARISING OUT OF THE MISCONDUCT FOR WHICH THEY PREVIOUSLY PAID CIVIL MONEY REGULATORY PENALTIES

The Double Jeopardy Clause provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." While the "primary evil to be guarded against is successive prosecutions," *Schiro* v. *Farley*, 510 U.S. 222, 230 (1994), the Court has also construed the Clause to bar "successive punishments." *United States* v. *Ursery*, 116 S. Ct. 2135, 2139 (1996); *United States* v. *Dixon*, 509 U.S. 688, 696 (1993). Civil statutes do not define "offenses," see *Kansas* v. *Hendricks*, 117 S. Ct. 2072, 2086 (1997), and a civil proceeding does not place the defendant in jeopardy within the accepted constitutional meaning of that term. See *Breed* v. *Jones*, 421 U.S. 519, 528 (1975). Ordinarily, therefore, Congress may impose both a civil and a criminal sanction for the same conduct, and such cumulative sanctions do not intrinsically violate the defendant's double jeopardy rights, see *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938), even when the civil sanction has some punitive effect. *Ursery*, 116 S. Ct. at 2145 n.2. In a "rare case," however, this Court has found that a civil sanction may impose "punishment" sufficient to implicate the Double Jeopardy Clause's proscription against multiple punishments. *United States* v. *Halper*, 490 U.S. 435, 451 (1989) (after imposition of a criminal penalty, the government may not "bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole").

Petitioners in this case claim the benefit of *Halper*'s rule. After collectively paying $44,000 to settle civil penalty assessments for banking violations, petitioners were indicted on criminal charges growing out of the same underlying events. Relying on *Halper*, petitioners argue that their indictments must be dismissed because (they argue) they were "punished" a first time when they paid civil money penalties, and so the government is now barred from seeking to punish them a second time by imposing any criminal sanction against them. Properly understood, however, the civil money penalties paid by petitioners do not constitute "punishment" that triggers double jeopardy protection under *Halper*. And neither that case nor other principles of double jeopardy law support petitioners' request for relief from all efforts to prosecute them for the same conduct involved in the regulatory penalty proceeding. If petitioners' argument were accepted, it would radically change the relationship between civil and criminal sanctions, by forcing an election between them and hampering the flexible use of civil money penalties in regulatory schemes. The Double Jeopardy Clause has never been thought to restrict the government's enforcement options in such a drastic manner.

A. CIVIL MONEY PENALTIES IMPOSED TO DETER REGULATORY VIOLATIONS DO NOT CONSTITUTE PUNISHMENT UNDER THE DOUBLE JEOPARDY CLAUSE

1. This Court's narrow holding in *Halper* announced "a rule for the rare case," in which a fixed-penalty provision, in a particular instance, produces a sanction "overwhelmingly disproportionate to the damages [the violator] caused." 490 U.S. at 449. *Halper*'s holding does not establish that the different kind of civil penalty imposed in this case—a money penalty designed to encourage

compliance with regulatory requirements—constitutes "punishment" for double jeopardy purposes.

In *Halper*, the defendant was first criminally prosecuted and convicted of violating the false claims statute, 18 U.S.C. 287 (1982), by submitting 65 inflated Medicare claims that each charged $12 for a $3 procedure. He was sentenced to two years' imprisonment and fined $5,000. 490 U.S. at 437 & n.2. The government later sought civil sanctions based on the same inflated claims under 31 U.S.C. 3729-3731 (1982), a "fixed-penalty-plus-double-damages provision[]" of the type that "in the ordinary case * * * can be said to do no more than make the Government whole." 490 U.S. at 449. For each violation, the statute required a penalty of $2,000, an additional amount equal to twice the government's damages, and the costs of the civil action. *Id.* at 438. Because Halper had violated the statute 65 times, he "appeared to be subject to a statutory penalty of more than $130,000." *Ibid.* The district court refused to enter judgment in that amount, on the theory that a penalty "more than 220 times greater than the Government's measurable loss qualified as punishment which, in view of Halper's previous criminal conviction and sentence, was barred by the Double Jeopardy Clause." *Id.* at 439-440. On the government's appeal, this Court agreed with the district court's conclusion. The Court emphasized that it was announcing a "rule for the rare case, * * * where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Id.* at 449.

Halper holds that when a civil money penalty is intended only to give the government "rough remedial justice," 490 U.S. at 446, a monetary penalty that far exceeds approximate compensation of the government's loss may be presumed to be punitive because it has "no rational relation" to the penalty's remedial goal. *Id.* at 449. That holding does not apply to a civil penalty scheme designed

primarily to encourage compliance with a regulatory regime. In that situation, the penalty scheme is fashioned to deter violations, and the size of the penalty may not correspond to actual pecuniary injury at all. Rather, the penalty may be based on a host of other factors, including the importance of the governmental interest at stake, the difficulty of detecting the violation, the magnitude of the potential injury, and the resulting need to deter the violation. The *Halper* test was not designed to determine whether such a conduct-shaping penalty is punitive for double jeopardy purposes.[7]

Since *Halper* was decided, the Court has twice concluded that its rule did not provide the proper analysis for deciding whether particular civil sanctions imposed punishment. In *Department of Revenue* v. *Kurth Ranch*, 511 U.S. 767, 784 (1994), the Court held that a state dangerous-drug tax imposed on a defendant who had already been convicted on narcotics charges was the "functional equivalent of a successive criminal

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[7] The *Halper* test has no literal application to a penalty imposed for a conduct-shaping purpose: while *Halper* requires a comparison between the economic harm to the government and the size of a compensatory civil penalty, 490 U.S. at 449-450, a penalty imposed for regulatory purposes may not correspond to economic harm to the government at all. Nor would it be easy to fashion a rule in this setting analogous to *Halper*, under which courts would decide on a case-by-case basis whether the penalty was "rationally related" (*id.* at 451) to a civil sanction's *deterrent* purpose.

At the same time, a particular penalty imposed under such a regulatory scheme may in fact be justifiable as a recoupment of the government's costs of investigating the violation. When such a relationship between penalty and "damages" exists, a defendant has no basis for claiming that *his* sanction amounts to punishment for purposes of the Double Jeopardy Clause. See pp. 31-35, *infra*. But such a case-by-case inquiry under *Halper* is generally not necessary to conclude that civil regulatory penalties are not punitive for double jeopardy purposes.

prosecution" that violated the Double Jeopardy Clause. The Court, however, found *Halper*'s test for civil penalties inapplicable because tax statutes "serve a purpose quite different from civil penalties, and *Halper*'s method of determining whether the exaction was remedial or punitive simply does not work in the case of a tax statute." *Id.* at 784 (internal quotation marks omitted); see also *id.* at 786 (Rehnquist, C.J., dissenting) ("the purpose of a tax statute is not to recover the costs incurred by the Government for bringing someone to book for some violation of law, but is instead either to raise revenue or to deter conduct, or both").

Similarly, in *United States* v. *Ursery*, 116 S. Ct. 2135 (1996), the Court rejected an effort to apply *Halper* outside its context. In that case, the respondents contended that *in rem* civil forfeiture judgments against cash and property seized from them imposed punishment for the criminal activity that provided the basis for the forfeiture. The Court held that *Halper* has no application to civil forfeitures:

> Forfeitures serve a variety of purposes, but are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct. Though it may be possible to quantify the value of the property forfeited, it is virtually impossible to quantify, even approximately, the nonpunitive purposes served by a particular civil forfeiture. Hence, it is practically difficult to determine whether a particular forfeiture bears no rational relationship to the nonpunitive purposes of that forfeiture. Quite simply, the case-by-case balancing test set forth in *Halper*, in which a court must compare the harm suffered by the Government against the size of the penalty imposed, is inapplicable to civil forfeiture.

Id. at 2145.

The decisions in *Kurth Ranch* and *Ursery* establish that *Halper*'s case-by-case test is not the exclusive means to determine whether a civil sanction is "punitive" in character. Indeed, the Court stated in *Ursery* that *Halper*'s "case-specific approach [is] impossible to apply outside the context of a fixed civil-penalty provision." 116 S. Ct. at 2146. *Ursery* and *Kurth Ranch* also make clear that *Halper* did not establish the broad rule, put forward by petitioners (Pet. Br. 15, 17), that a civil sanction is always "punishment" unless it is imposed to remedy ascertainable financial harm to the government. Civil sanctions have a variety of purposes, and the double jeopardy analysis must be tailored to the nature of the sanction at issue. The goal of compensating the government for pecuniary loss is one nonpunitive goal. But so is the goal of compelling disgorgement of the fruits of wrongdoing.[8] Likewise, the goal of achieving regulatory objectives by "motivating future behavior"—*i.e.*, "discourag[ing] conduct that the government wishes to discourage and encourag[ing] conduct that it wishes to encourage"[9]—may also be nonpunitive.

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[8] In *Ursery*, 116 S. Ct. at 2148-2149, the Court characterized as "nonpunitive" the "goal of ensuring that persons do not profit from their illegal acts." The lower courts have likewise consistently held that a civil penalty that requires the defendant to part with the proceeds of his illegal conduct does not constitute punishment for double jeopardy purposes. See *United States* v. *Gartner*, 93 F.3d 633, 635 (9th Cir.), cert. denied, 117 S. Ct. 624 (1996); *Smith* v. *United States*, 76 F.3d 879, 882 (7th Cir. 1996); *United States* v. *Fields*, 72 F.3d 1200, 1209 (5th Cir.), cert. denied, 117 S. Ct. 48 (1996); *United States* v. *Carson*, 52 F.3d 1173, 1182-1183 (2d Cir. 1995), cert. denied, 116 S. Ct. 934 (1996); *SEC* v. *Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994).

[9] C. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 Colum. L. Rev. 1435, 1456 (1979).

Civil money penalties are frequently employed by Congress (and have always been employed in our legal system, see pp. 21-24, *infra*) for such a conduct-shaping purpose. The fact that a conduct-shaping purpose, which may appropriately be referred to as "deterrence," animates a civil money penalty provision does not require the conclusion that the civil penalty imposes "punishment" within the meaning of the Double Jeopardy Clause. Although language in *Halper* suggested that a sanction that even in part serves the goals of retribution or deterrence is punishment, 490 U.S. at 448, this Court expressly rejected that suggestion in later decisions. In *Ursery*, the Court explicitly stated that a civil sanction may punish in part without triggering the Double Jeopardy Clause. 116 S. Ct. 2146 n.2.[10] And in three cases, the Court has held that a

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[10] As the Court explained in *Ursery*,

> Whether a particular sanction "cannot fairly be said *solely* to serve a remedial purpose" [*Halper*, 490 U.S. at 448; emphasis added in *Ursery*] is an inquiry radically different from that we have traditionally employed in order to determine whether, as a categorical matter, a civil sanction is subject to the Double Jeopardy Clause. Yet nowhere in *Halper* does the Court purport to make such a sweeping change in the law, instead emphasizing repeatedly the narrow scope of its decision. * * * If the "general rule" of Justice [Stevens' dissenting opinion] were applied literally, then virtually every sanction would be declared to be a punishment; it is hard to imagine a sanction that has no punitive aspect whatsoever. Justice [Stevens'] interpretation of *Halper* is both contrary to the decision itself and would create an unworkable rule inconsistent with well-established precedent.

116 S. Ct. 2146 n.2. The reading of *Halper* suggested by Justice Stevens in his separate opinion in *Ursery* (116 S. Ct. at 2156)—that any civil sanction that is not solely remedial but is in part "deterrent or retribution" constitutes punishment for double jeopardy purposes—is the test endorsed by petitioners in this case (see Pet. Br. 18-19). As the passage quoted above indicates, however, that reading of *Halper* was rejected by the Court in *Ursery*.

civil sanction may "serve[] a deterrent purpose distinct from any punitive purpose." *Ursery*, 116 S. Ct. at 2149; *Bennis* v. *Michigan*, 116 S. Ct. 994, 1000 (1996) (same); *Kurth Ranch*, 511 U.S. at 779-780 (even an "obvious deterrent purpose" is insufficient to conclude that a tax constitutes "a form of punishment"). The conclusion that a deterrent purpose may be "distinct from any punitive purpose" is fully applicable to civil money penalties that support regulatory schemes.[11]

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[11] What does define a penalty as punishment for the purposes relevant here is an overriding goal of retribution—the purpose to attach a stigma or blame to one for having transgressed society's laws. See C. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 Geo. L.J. 775, 803-813 (1997); C. Diver, *supra*, 79 Colum. L. Rev. at 1456 & nn. 133, 136; M. Cheh, *Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 Hastings L.J. 1325, 1357 (1991); see also *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 189-190 (1963) (Brennan, J., concurring); *United States* v. *Lovett*, 328 U.S. 303, 324 (1946) (Frankfurter, J., concurring). That punitive purpose, which is absent from OCC's penalty scheme, must be distinguished from deterrence, even though both are coupled in some legal sanctions, such as a criminal conviction and sentence.

The Court has stated that "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives," *Bell* v. *Wolfish*, 441 U.S. 520, 539 n.20 (1979); *Halper*, 490 U.S. at 448, and has described the "traditional aims of punishment" as "retribution and deterrence," *Mendoza-Martinez*, 372 U.S. at 168. The Court has not held, however, that deterrence by itself, unaccompanied by the goal of retribution, attachment of stigma, or the like, constitutes "punishment" in the sense relevant here. Deterrence and retribution, together, may constitute punishment; but that does not mean that deterrence by itself is also necessarily punishment. See *Halper*, 490 U.S. at 448 (punishment serves "the twin aims" of retribution and deterrence). Although the Court in *Halper* stated that a civil sanction that serves "*either* retributive or deterrent purposes" is punishment, *ibid.* (emphasis added), that use of the disjunctive was unnecessary to the decision in the case, and the Court in *Ursery* described that locution in *Halper* as

2. History further undermines any suggestion that civil money penalties imposed for regulatory violations should be deemed inherently punitive for double jeopardy purposes. Legislatures have long employed civil money penalties to deter violations of law. Yet there is no tradition that such civil penalties are tantamount to punitive criminal proceedings, or that the government must elect between a civil action to recover a penalty and a criminal prosecution to punish an offense.

Beginning in at least the 15th Century, Parliament enacted regulatory statutes, the violation of which carried monetary penalties.[12] By the late 18th Century, at least 200 English statutes carried monetary penalties for violations; those statutes regulated diverse subjects such as liquor sales, labor, smuggling, highway traffic, Sabbath observance, gambling, and disorderly conduct. See F. Frankfurter & T. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial By Jury*, 39

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dictum. 116 S. Ct. at 2145 n.2. See also *Atlas Roofing Co.* v. *OSHRC*, 518 F.2d 990, 1002 (5th Cir. 1975) (statute is not punitive if it seeks to promote "a kind of prospective deterrence [or] a means to encourage compliance with the government regulation"), aff'd, 430 U.S. 442 (1977).

[12] See II Hen. VII ch. 17 ("That no Man take any Ayrer Faulcon, Goshawk * * * upon Pain of Ten Pounds, the one Half thereof to the Party that will sue for the same by Action of Debt, by Examination befor the Justices of the Peace, Information, or otherwise, and the other Half to the King."). Earlier English law had developed two forms of monetary penalties payable to the Crown: amercements and fines. Amercements generally could be recovered through an action for debt, whereas fines were paid to avoid imprisonment on a criminal matter. See 2 F. Pollock & W. Maitland, *The History of English Law Before the Time of Edward I*, at 510-519 (1968); 2 *Bracton on the Laws and Customs of England* 329-333 (S. Thorne trans. 1968); 3 W.S. Holdsworth, *A History of English Law* 435 (1923). Amercements eventually fell into disuse, and were replaced by civil penalties; the use of the fine in criminal proceedings continued. 3 W. Blackstone, *Commentaries on the Laws of England* 375 (1768).

Harv. L. Rev. 917, 928-929 (1926). Typically, civil-penalty statutes could be enforced through civil actions for debt brought by private parties, with part of the recovery going to the Crown, rather than through proceedings with the hallmarks of criminal prosecutions. See 2 W.S. Holdsworth, *A History of English Law* 367 (1923).[13] Blackstone explained that civil penalties for statutory violations were recoverable in actions for debt on the theory that statutory regulations were analogous to terms of a contract with society, and the money penalties were analogous to liquidated damages for breach of the contract. 3 W. Blackstone, *Commentaries on the Laws of England* 159 (1768). We are aware of no evidence that, at English common law, an action for such penalties was thought to constitute a "jeopardy" that would bar subsequent prosecution for the same underlying conduct.

In this country, colonial legislatures enacted hundreds of statutes carrying civil penalties for violations, and similar statutes were enacted by the legislatures of the early state governments. See F. Frankfurter & T. Corcoran, *supra*, at 983-1019 (appendices). In its first ten years, Congress enacted at least 37 statutes carrying civil penalties.[14] Faced with claims that those penalties could only be collected through criminal proceedings, the courts uniformly sustained the use of civil proceedings to recover monetary penalties for statutory violations, even while noting the deterrent nature of the penalty provisions. See *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320 (1909) (upholding delegation to administrative officers of the authority to set the amount of a deterrent civil penalty for the violation of an immigration law); *Hepner* v. *United*

[13] The king could also bring the suit himself, in which case the Crown would recover the entire penalty. 4 W. Blackstone, *supra*, at 160.

[14] Those statutes are collected in Appendix A, *infra*, 1a-4a.

States, 213 U.S. 103 (1909) (upholding use of a directed verdict in favor of the United States in a civil action to recover deterrent penalties for illegally importing aliens); *Passavant* v. *United States*, 148 U.S. 214, 221 (1893) (upholding delegation to administrative officers of power to set penalty for importers' undervaluation of goods, and noting that the penalty was "designed to discourage undervaluation"); *Stockwell* v. *United States*, 80 U.S. (13 Wall.) 531, 543 (1871) (holding that the government could bring a civil action to recover penalties in the amount of double the value of goods illegally imported into the United States, even though "an indictment or information [for the same violation] might be sustained").

That history indicates that civil penalties have always been deployed, not only for compensatory purposes, but also as sanctions for violations of law. See *Tull* v. *United States*, 481 U.S. 412, 422-423 (1987). That purpose continues to be served by contemporary civil penalty provisions. A comprehensive 1979 survey of civil money penalty provisions enforced by federal agencies found "some 348 statutory civil penalties enforced by 27 federal departments and independent agencies," which provisions were authorized for "the enforcement of a host of regulatory commands." C. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 Colum. L. Rev. 1435, 1438 (1979). The civil penalty provisions typically permitted assessment based on factors such as the nature, extent, and seriousness of the violation, the degree of participation of the violator, the violator's ability to pay, "and such other matters as justice may require." *Id.* at 1441. The lengthy pedigree and pervasiveness of "deterrent" civil penalty provisions in federal law casts significant doubt on petitioners' apparent view that all such penalties, regardless of amount, are so punitive as to be the "rare case" contemplated by the *Halper* Court.

Such an extension of *Halper* could seriously impair the government's ability to protect the integrity of its regulatory schemes. The thrust of petitioners' contention is that, because the civil penalties they paid were not intended to compensate the government for any actual pecuniary loss but were imposed to achieve deterrence, those penalties must, under *Halper*, be understood as "punishment," with the effect of foreclosing any and all efforts to punish through the criminal law. See Pet. Br. 12-13, 19-21. Petitioners appear to take that view regardless of the size of the penalties imposed, or of the public interests at stake. But dual civil money-penalty and criminal enforcement schemes are, and always have been, common in the law. See *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 555 (1943) (Frankfurter, J., concurring) ("[L]egislation of this character, providing two sanctions for the same misconduct, enforceable in separate proceedings, one a conventional criminal prosecution, and the other a forfeiture proceeding or a civil action as upon a debt, was quite common when the Fifth Amendment was framed by Congress."). If the deterrent component to regulatory civil money penalties invariably marked them as "punitive" under *Halper*, then the government would be forced to elect between a civil and criminal remedy whenever it uncovered a course of conduct that violated both civil and criminal provisions.

That forced election could in many cases skew the fair enforcement of the law. For example, the government might initially impose a modest civil penalty against a violator but later discover, through further investigation, that the violations were intentional and were more severe than previously thought. Under petitioners' rule, the government would be barred from criminal prosecution, and the wrongdoers would escape an appropriate punishment for their offense. Conversely, petitioners' rule might lead the government to forgo civil penalties because

of concerns that their assessment would immunize a party from possible criminal punishment in the future, no matter how deserved. But that result, too, would be contrary to the public interest, for it would hamper regulators in applying the flexible civil penalty schemes that Congress provided to enforce the regulatory programs it created.

3. All the foregoing factors—the self-consciously narrow holding of *Halper*, the limitations recognized in later cases, the long history of civil regulatory penalties, and the practical difficulties that would flow from extending *Halper* to this setting—suggest that *Halper*'s case-by-case test does not apply unless the civil penalty at issue is intended principally to provide recompense for pecuniary losses caused by the defendant, but appears grossly disproportionate to that end. That is not the case here. Rather, the punitive or nonpunitive character of the regulatory penalties at issue in this case is better assessed by consideration of the nature and character of the sanctions as a categorical matter. Here, as in *Ursery* (116 S. Ct. at 2147), "a useful analytical tool" for assessing whether the civil penalties imposed on petitioners constitute "punishment" is the two-part test of *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980). That test inquires, first, whether Congress intended to establish a civil, rather than a criminal sanction, and second, if Congress has indicated an intention to establish a civil penalty, "whether the statutory scheme [is] so punitive either in purpose or effect as to negate Congress' intention." *Ibid.*; see also *Ursery*, 116 S. Ct. at 2141-2142. While that inquiry may not exhaust the double jeopardy analysis in all cases, it will suffice in all but the most extreme ones.[15]

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[15] In *Ward* and in *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984), the Court applied that two-part test to determine whether the imposition of a particular sanction "was intended as

As to the first inquiry, Congress clearly intended the money penalties imposed on petitioners to be civil sanctions. OCC assessed penalties on petitioners pursuant to 12 U.S.C. 93 and 504 (1982) for violations of 12 U.S.C. 84 and 375b (1982), respectively, and implementing regulations. Before its amendment in 1989, Section 93 provided for the imposition of a "civil money penalty" on banks and bank officers who violated any of several banking-law provisions, including Section 84, and authorized the Comptroller to impose "a civil money penalty of not more than $1,000 per day for each day during which [the] violation continues." 12 U.S.C. 93(b) (1982). Similarly, before its 1989 amendment, Section 504, titled "Civil penalty," provided for imposition of monetary penalties against any bank or bank officer that violated any of several sections of Title 12, including Section 375b. 12 U.S.C. 504(a) (1982). Neither provision defined an offense or provided criminal enforcement mechanisms, and both provisions formed part of "a complete system for the establishment and government of national Banks," *Cook County National Bank* v. *United States*, 107 U.S. 445, 448 (1883), "for the protection of the bank's depositors and other creditors." *Deitrick* v. *Greaney*, 309 U.S. 190, 194 (1940).

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punishment, such that the proceeding is essentially criminal in character." *Id.* at 362. A determination that a particular sanction is "civil" rather than "criminal" under the *Ward/89 Firearms* test may not always dispose of the double jeopardy multiple-punishments issue; the Court in *Halper* declined to rely on the "label[]" attached to a proceeding by application of the *Ward* test, but went on to evaluate the sanction as applied in a particular case. *Halper*, 490 U.S. at 447. Here, however, as in *Ursery*, a conclusion that a monetary penalty imposed in a regulatory scheme is "civil" under the *Ward* test does show that the penalty is neither "punishment" nor "criminal" for purposes of the Double Jeopardy Clause. *Ursery*, 116 S. Ct. at 2148.

As to the second inquiry, the Court has required the "clearest proof" to conclude that a "statutory scheme [is] so punitive either in purpose or effect" as to negate Congress's intention to establish a civil, regulatory scheme. *Ward*, 448 U.S. at 248-249. In making that assessment, the Court has looked for "guidance" to a list of factors set forth in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), and subsequent cases.[16] Those *Mendoza-Martinez* factors show that the civil penalties in this case were not punitive, let alone *so* punitive as to require setting aside Congress's intention to create a civil, regulatory sanction.

First, the monetary penalties do not involve an affirmative disability or restraint, such as imprisonment.[17] Second, civil penalties have not historically been regarded

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[16] "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions." *Mendoza-Martinez*, 372 U.S. at 168-169; see also *Ursery*, 116 S. Ct. at 2148-2149; *United States* v. *Salerno*, 481 U.S. 739, 747 (1987); *Schall* v. *Martin*, 467 U.S. 253, 269 (1984); *89 Firearms*, 465 U.S. at 365; *Ward*, 448 U.S. at 249-251; *Wolfish*, 441 U.S. at 537-538.

[17] Petitioners seek to augment their showing that they suffered punishment by relying on their debarment from further participation in the banking industry. Pet. Br. 21, 32. It is settled, however, that debarment is a purely remedial sanction designed to protect a regulated industry. See *Helvering* v. *Mitchell*, 303 U.S. at 399 & n.2 ("debarment" is a remedial sanction); *United States* v. *Rusk*, 96 F.3d 777, 778-779 (5th Cir. 1996) (collecting cases). And the fact that petitioners may no longer be in a position to commit further violations does not convert the deterrent impact of the civil penalties into punitive sanctions.

as punishment. To the contrary, "the payment of fixed or variable sums of money [is a] sanction[] which ha[s] been recognized as enforcible by civil proceedings since the original revenue law of 1789." *Helvering* v. *Mitchell*, 303 U.S. at 400; see also pp. 21-24, *supra*. Third, the provisions under which the penalties were assessed, 12 U.S.C. 93 and 504, do not come into play only on a finding of *scienter*; a civil money penalty may be assessed against on any person or bank "who violates" any of the underlying banking statutes, without regard to the violator's state of mind. See pp. 45-46, *infra*.

Fourth, although the penalties promote deterrence, one of the "twin aims" of punishment (*Halper*, 490 U.S. at 448), deterrence, by itself, is not an inherently punitive purpose. Because deterrence is as consistent with civil, regulatory goals as it is with punishment, even a penalty with a predominantly deterrent aspect does not necessarily have the character of punishment. See pp. 19-20, *supra*. Petitioners contend (Br. 24-25) that the factors that OCC must, by statute, consider in setting the amount of the penalty—"the appropriateness of the penalty with respect to the size of the financial resources and good faith of the * * * person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require"—show that the civil penalties are punitive, because they require a focus on a violator's culpability and his individual circumstances. But a civil penalty does not become punitive simply because Congress links the size of the penalty to the violator's culpability or his ability to pay.[18] Adjustment of a civil penalty based

[18] In *Helvering* v. *Mitchell*, for example, the penalty at issue depended solely on whether the defendant engaged in "fraud with intent to evade tax," yet this Court held that it was a "civil administrative sanction." 303 U.S. at 405-406. And in *Ward*, as in this case, the penalty provision provided that in determining the amount of the penalty, the government was to consider "the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation." 448 U.S. at 245. This Court nevertheless found the evidence that the statute had a "punitive purpose or effect" to be "quite weak." *Id.* at 254.

on the gravity of a violation or the violator's culpability is fully consistent with the non-punitive aspect of deterrence. Grave violations warrant greater deterrence than technical ones, and intentional disregard of regulations may require stronger deterrence than inadvertent errors. See C. Diver, *supra*, 79 Colum. L. Rev. at 1457-1463. And factors intended by Congress to mitigate the impact of penalties in particular cases (such as reductions because of the offender's diminished ability to pay) cannot render a penalty provision punitive overall.

Fifth, conduct sufficient to trigger a civil penalty under Sections 93 and 504 may be, but is not necessarily, criminal. For example, a banking officer may be subject to a penalty under these statutes for a negligent violation of the statute that would not support a prosecution under criminal statutes designed to punish banking-related offenses. See pp. 45-46, *infra*. OCC's imposition of a civil penalty does not depend on a showing that the penalized conduct has *already* been punished under the criminal law. Cf. *Kurth Ranch*, 511 U.S. at 781 (finding dangerous-drug tax to be punitive because it applied only to conduct that was illegal under criminal law). Finally, the money penalty provisions in the banking statutes are "rationally * * * connected" to the regulatory goal of protecting the banking system from impairment, and money penalties are hardly an excessive sanction in relation to that goal. Especially in regulating economic activity, money penalties designed to remove a profit incentive from violations

are an apt way to encourage ongoing compliance with the law.

Thus, there is no sound basis for finding that the civil penalty provisions at issue here must be understood as invariably and inherently "punitive" for double jeopardy purposes. The imposition of a civil money penalty is limited by the requirements of the Due Process Clause, and its size may be subject to review under the Eighth Amendment's Excessive Fines Clause. Statutory limitations and judicial review provide further protection against arbitrary and oppressively large penalties. Given those safeguards, few if any regulatory civil penalty penalties will go beyond their legitimate deterrent purpose and will be transformed into punishment under double jeopardy analysis. Cf. *Ursery*, 116 S. Ct. at 2148 n.3. But even if some penalty of that extreme character would warrant relief under the Double Jeopardy Clause, there is no basis for finding that the $44,000 civil penalties assessed against petitioners under the banking regulatory scheme at issue here constituted "punishment" rather than a reasonable regulatory sanction. Thus, those penalties do not foreclose all efforts to prosecute petitioners criminally for the same conduct.

B. IF CIVIL REGULATORY PENALTIES ARE SUBJECT TO *HALPER*, THE CIVIL ASSESSMENTS AGAINST PETITIONERS WERE REMEDIAL BECAUSE THEY REASONABLY REIMBURSED THE GOVERNMENT FOR ITS INVESTIGATIVE AND ADMINISTRATIVE COSTS

Even if it were appropriate to apply *Halper*'s case-specific analysis here, the civil penalties paid by petitioners would not constitute "punishment." Those penalties, viewed objectively, served a valid remedial purpose: they reimbursed the government for its costs of investigating petitioners' violations of the banking laws—which investigation also led to the remedial sanction of debarment from banking activities. The evidence introduced in the district court established that the government's investigative costs were approximately $72,000 (Pet. App. 3a), an amount exceeding the total of the penalties assessed on all three petitioners. Because petitioners were not punished a *first* time when they paid penalties less than those investigatory costs, they will not be punished a *second* time in this criminal case.

1. In *Halper*, the Court stated that

> [w]here a defendant has previously sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.

490 U.S. at 449-450. In *Ursery*, the Court described the method for applying *Halper*'s case-specific test by observing that "[w]hether a 'fixed-penalty provision' that

seeks to compensate the Government for harm it has suffered is 'so extreme' and 'so divorced' from the penalty's nonpunitive purpose of compensating the Government as to be a punishment may be determined by balancing the Government's harm against the size of the penalty." 116 S. Ct. at 2145. Thus, if *Halper* is applicable here, its test requires a comparison between the harm to the government and the size of the penalty.

Halper also makes clear that, in comparing the harm to the government with the penalty imposed on a defendant, a court must "factor in[]" "the Government's investigative and prosecutorial costs." 490 U.S. at 446 n.6. In that respect, *Halper* followed the Court's prior cases that have addressed whether assessment of a nominally civil monetary penalty implicates the Double Jeopardy Clause. For example, in *Helvering* v. *Mitchell*, 303 U.S. at 401, the Court held that a 50% civil penalty assessed for fraudulent evasion of income taxes was remedial because it "was provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud." Similarly, in *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237 (1972), the Court held a forfeiture provision to be remedial in part because it "serve[d] to reimburse the Government for investigation and enforcement expenses." See also *Kurth Ranch*, 511 U.S. at 777 ("a so-called civil 'penalty' may be remedial in character if it merely reimburses the government for its actual costs arising from the defendant's criminal conduct"); *id.* at 794-795 (O'Connor, J., dissenting).[19]

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[19] Petitioners argue (Pet. Br. 31-32) that the government's effort to justify the penalties in this case based on its investigative costs was developed only after the penalties were assessed. Under *Halper*, however, the government is not required to justify the size of the penalty at all until the defendant makes a preliminary showing that the civil penalty "appears to qualify as 'punishment'" because it bears no rational relation to compensation of the government for its costs and damages. See 490 U.S. at 449. Indeed, in *Halper*, the Court remanded the case to permit the government to prove its actual costs arising from Halper's fraud, even though the government had previously not challenged the district court's conclusion that the amount of the penalty was not related to the government's expenses. *Id.* at 452.

Halper requires only an objective comparison of the government's costs with the penalties imposed. It "does not authorize courts to undertake a broad inquiry into the subjective purposes that may be thought to lie behind a given judicial proceeding. * * * Such an inquiry would be amorphous and speculative, and would mire the courts in the quagmire of differentiating among the multiple purposes that underlie every proceeding, whether it be civil or criminal." *Halper*, 490 U.S. at 453 (Kennedy, J., concurring). Thus, under *Halper*, the relevant inquiry should be whether the civil penalty grossly exceeds the costs and damages that the government is able to prove—even if the government's purposes in imposing the civil penalty did not include such compensation. A rule that disregarded such costs where they were not expressly considered would provide a double-jeopardy windfall when the size of the actual penalty does no more than compensate for harm. *Halper* does not require that result.

2. Petitioners acknowledge that payments to the government for the costs of enforcement can be remedial when the government seeks compensation for a financial harm that it has suffered, but they assert that such penalties cannot be remedial when the government acts to ferret out and correct harms done to others, including the public at large. They argue that "the Court has never * * * sustained as 'remedial' a sanction that did not actually 'remedy' a harm to the government, but merely

covered the costs of investigating *harms caused to other parties*." Pet. Br. 29. [20]

There is no basis for petitioners' distinction between the costs of government's investigation of damage done to its financial interests, and the costs of the government's investigation of harm done to the public. Petitioners' conduct injured the integrity of the federal banking system by contributing to the failure of two banks.[21] Such serious impairments of the government's programmatic concern for the safety and soundness of the banking system are injuries to the government in its role as protector of the public interest. See *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 153 (1956) (noting that the case involved "injury to the Government" because the defendants' actions interfered with the purposes of the surplus property program by "preclud[ing] bona fide sales to veterans" and "promot[ing] undesirable speculation").

Relying on *S.A. Healy & Co.* v. *OSHRC*, 96 F.3d 906 (7th Cir. 1996), petition for cert. pending, No. 96-1299 (filed Feb. 13, 1997), petitioners argue (Pet. Br. 31) that, if reimbursing the government for its costs in enforcing the law against others were a remedial purpose, then all monetary penalties, including those imposed in criminal cases, would avoid scrutiny under the Double Jeopardy Clause as "remedial" sanctions. The Court has recognized, however,

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[20] Petitioners also argue that treating payments for the costs of enforcement as remedial constitutes "fee shifting" in violation of the "American Rule" that the parties to litigation bear their own attorneys' fees. That argument is without merit. The sanction against petitioners is not "fee shifting"; it is remedial because it recovers the costs to the government caused by petitioners' improper conduct. In any event, *Mitchell*, *One Lot Emerald Cut Stones*, and *Halper* have squarely held that such costs may be considered remedial.

[21] Those bank failures caused a loss to the Federal Deposit Insurance Fund. Pet. App. 97a. Thus, it is inaccurate to say that the government did not suffer a financial injury in this case.

that "both punitive and remedial goals may be served by criminal penalties." *Halper*, 490 U.S. at 447; cf. *Helvering* v. *Mitchell*, 303 U.S. at 402 n.6 ("nothing in the Constitution prevents the enforcement of distinctly remedial sanctions by a criminal instead of a civil form of proceeding"). The Double Jeopardy Clause is principally directed against abuse of the criminal process, because criminal law *inherently* involves punishment (whatever else it may involve), and because criminal prosecutions impinge on individual liberty in a unique way. A civil sanction that serves only to make the government whole does not implicate those concerns, even if the sanction was calibrated to achieve other objectives.[22]

C. THE IMPOSITION OF CIVIL PENALTIES DOES NOT CONSTITUTE A "JEOPARDY" THAT MAY BAR LATER CRIMINAL PROSECUTION

1. Petitioners' double jeopardy claim fails for an additional reason: petitioners may not raise a defense of a former jeopardy because the concept of jeopardy does not encompass payment of civil money penalties. Rather, "jeopardy" refers only to the specific risks associated with a criminal trial.

In light of the history of the Double Jeopardy Clause, the Court has interpreted "jeopardy" to involve the dan-

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[22] Petitioners also contend that the government should not be allowed to rely on an allocation of the salaries and benefits of OCC employees assigned to investigate and prosecute their conduct because the government is contractually bound to pay those salaries and benefits anyway. The government's need to retain such employees, however, results from the existence of violators such as petitioners. Petitioners also argue, relying on Judge Noonan's dissenting opinion in *United States* v. *Walker*, 940 F.2d 442 (9th Cir. 1991), that the court of appeals' rationale would justify assessing a violator with a *pro rata* share of the cost of the entire government. In this case, however, the government relied only on the amount that one agency had expended in investigating petitioners' conduct.

gers associated with the actual trial of a criminal case. "Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution." *Breed* v. *Jones*, 421 U.S. at 528; see *Serfass* v. *United States*, 420 U.S. 377, 391 (1975) ("Both the history of the Double Jeopardy Clause and its terms demonstrate that it does not come into play until a proceeding begins before a trier 'having jurisdiction to try the question of the guilt or innocence of the accused.' "); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 548-549 (1943) (" 'jeopardy' within the constitutional meaning" refers to the risks associated with "actions intended to authorize criminal punishment"). The Clause's focus on criminal prosecutions responds to the unique role and consequences of criminal sanctions in our society. A conviction represents the societal judgment that a person is a criminal and subjects that person to stigma that is unmatched by any other assertion of governmental power. See *Breed* v. *Jones*, 421 U.S. at 531; see also *Price* v. *Georgia*, 398 U.S. 323, 331 n.10 (1970).

In *Halper*, the Court found a violation of the Clause in the imposition of punitive civil fines on a defendant "who already ha[d] been punished in a criminal prosecution." 490 U.S. at 448-449. *Halper*'s rule was carefully limited to civil punitive fines that *follow* a completed criminal prosecution. As the Court stated, "the only proscription established by our ruling is that the Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole." *Id.* at 451.

The Court's later decision in *Kurth Ranch* arose in a posture similar to that of *Halper*: after the State completed its criminal proceedings against the defendants, it assessed a tax on dangerous drugs. The Court concluded

that the dangerous-drug tax was punitive in all its applications, and was therefore "not the kind of remedial sanction *that may follow the first punishment of a criminal offense*. Instead, it is a second punishment within the contemplation of [the] constitutional protection" against multiple punishment. 511 U.S. at 784 (emphasis added). The Court noted that the case "[did] not raise the question whether an ostensibly civil proceeding that is designed to inflict punishment may bar a subsequent proceeding that is admittedly criminal in character," *id.* at 781 n.21. *Kurth Ranch* therefore expressly left open the issue in this case.

Halper rested on a distinct branch of double jeopardy doctrine that protects defendants against multiple punishments for the same offense. See *Halper*, 490 U.S. at 440 (quoting *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873)). In *Lange*, the Court relied in part on the Double Jeopardy Clause to hold that, when the legislature has authorized the imposition of two alternative criminal punishments, the defendant's service of either sentence precludes the sentencing court from imposing the other. The Court reasoned that the Clause's protection would be of little value "if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time." 85 U.S. (18 Wall.) at 173.

In light of the reasoning of *Lange*, the Court has interpreted the multiple punishments doctrine to protect "against additions to a sentence in a subsequent proceeding that upset a defendant's legitimate expectation of finality" in a completed criminal proceeding. *Jones* v. *Thomas*, 491 U.S. 376, 385 (1989); *United States* v. *Wilson*, 420 U.S. 332, 343 (1975). *Halper* extended that principle to protect the defendant's interest in finality against punitive civil sanctions. The Court explained in *Halper*

that the rule it announced protected the defendant against an unexpected and improper "addition" to his criminal sentence: "That the Government seeks the civil penalty in a second proceeding is critical in triggering the protections of the Double Jeopardy Clause. * * * [W]hen the Government has already imposed a criminal penalty and seeks to impose additional punishment in a second proceeding, the Double Jeopardy Clause protects against the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding." 490 U.S. at 451 n.10. Thus, once the government has obtained a conviction and sentence through the criminal process, it may not impose an additional punishment for the same offense, whether that additional punishment be explicitly criminal, as in *Lange*, or nominally civil but punitive in effect, as in *Halper*.

But while *Halper* extended the multiple punishments principle to embrace a civil-but-punitive addition to a sentence, it did not hold that a civil proceeding that results in the assessment of penalty (even a punitive one) is a "jeopardy" that might bar later criminal prosecution. Nor does *Halper* imply that punitive civil penalties constitute a separate and distinct "jeopardy." From the inception of the multiple-punishments doctrine in *Lange*, that doctrine has applied to punishments meted out in a single, criminal proceeding—in which there is plainly only one "jeopardy."

There is no anomaly in concluding that *Halper* applies only to the imposition of civil penalties *after* completed criminal prosecutions, but does not affect prosecutions following completed civil penalty proceedings. That difference reflects the very concerns articulated by the Court in *Halper*. When the government seeks to impose a punitive civil penalty after a criminal conviction, there may be a risk that the additional punishment is sought because of dissatisfaction with the sentence. *Halper*, 490

U.S. at 451 n.10. When the government has not yet prosecuted a defendant, however, pursuit of criminal charges does not imply a belief that a particular civil sanction was inadequate. Rather, a criminal prosecution represents the judgment that *no* civil sanction is adequate to address the culpability of particular conduct. Because petitioners have not been subjected to the hazards of a criminal trial for their banking violations, they have not been subjected to jeopardy at all. They also have no expectation of finality in a criminal sentence, for none has been entered against them. Accordingly, *Halper*'s protection against punitive additions to criminal sentences has no application here.

2. If, contrary to our submission, a double jeopardy violation could be threatened by a criminal prosecution following a "punitive" civil penalty, the remedy should not be, as petitioners' contend (Pet. Br. 12), dismissal of the indictment altogether. This Court's cases indicate that a double jeopardy violation, like other constitutional violations, must be remedied only to the extent of the injury suffered. See, *e.g.*, *Jones* v. *Thomas*, 491 U.S. at 380-387; *Morris* v. *Mathews*, 475 U.S. 237, 247 (1986). A defendant who prevails on a *Halper* claim has not shown a violation of the multiple prosecutions prong of double jeopardy law; accordingly, such a defendant should not generally be entitled to foreclose the second proceeding entirely if there is a mechanism to avoid impermissible double punishment. See *id.* at 246-247 (reducing second conviction to offense that was not jeopardy-barred).

Here, an appropriate mechanism exists: a defendant may be given "credit" in any eventual criminal sentence for any punishment imposed by the payment of civil penalties. A "credit" for prior punishment could directly offset a criminal fine with the prior payments, or otherwise reduce the sentence. See *Jones* v. *Thomas*, 491 U.S. at 381-382 (defendant improperly sentenced to consecutive sentences for robbery and felony murder had his interest in avoiding

multiple punishment "fully vindicated" by vacating the attempted robbery conviction and sentence and crediting the time served for robbery against the longer sentence for felony murder); *Witte* v. *United States*, 515 U.S. 389, 404-406 (1995) (noting authority of sentencing court to adjust sentence to reflect prior punishment in a related proceeding). A precise credit may not be possible in all cases, but, in general, a credit approach would provide a more measured remedy for a *Halper* violation predicated on a prior civil money penalty than would complete foreclosure of any opportunity to vindicate the criminal law.

D. EVEN IF PETITIONERS WERE PUNISHED BY THE CIVIL ASSESSMENT, THEY WERE NOT PUNISHED FOR THE "SAME OFFENSES" AS THOSE CHARGED IN THE INDICTMENT

1. In *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), this Court stated that two offenses are not the "same" for purposes of the Double Jeopardy Clause if "each [offense] requires proof of a fact which the other does not." See also *United States* v. *Dixon*, 509 U.S. 688, 696 (1993) (test is "whether each offense contains an element not contained in the other"). The *Blockburger* test focuses on the elements of the offenses at issue, not the specific acts charged by the government to satisfy those offenses or the actual proof at trial. Under that test, the administrative proceeding and the criminal prosecution in this case do not involve the same offense.[23]

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[23] The petition for a writ of certiorari did not ask the Court to consider whether the criminal and civil sanctions involve the "same offense," but presented only the question whether the civil penalties should be characterized as punitive or remedial. See Pet. I. Nevertheless, as the prevailing party, the government is entitled to defend the judgment on any ground preserved below. *Massachusetts Mutual Life Ins. Co.* v. *Ludwig*, 426 U.S. 479, 481 (1976) (per curiam); *Langnes* v. *Green*, 282 U.S. 531, 536-539 (1931). Because the court of appeals did not reach the issue, however, the Court may wish to remand for consideration of that issue if it otherwise accepts petitioners' double jeopardy claim. See *Wilson* v. *Arkansas*, 514 U.S. 927, 937 (1995).

Petitioners argue, however, that *Blockburger* does not provide the appropriate test in cases like this one to determine whether the offenses are "the same." They contend that the Court has articulated a same-conduct, rather than same-elements, test, in its successive-punishment cases. That contention cannot be sustained.

Blockburger itself was a multiple-punishments case. The defendants contended there that Congress did not intend for them to be punished for a single sale of narcotics under two different statutes, but the Court concluded that the two statutes were not the same offense, as "[e]ach of the offenses created requires proof of a different element." 284 U.S. at 304. Since *Blockburger*, the Court has reaffirmed that the elements test governs multiple-punishment claims. See *Rutledge* v. *United States*, 116 S. Ct. 1241, 1245 (1996); *Ball* v. *United States*, 470 U.S. 856, 861 (1985); *Whalen* v. *United States*, 445 U.S. 684, 691 (1980); *Brown* v. *Ohio*, 432 U.S. 161, 166-168 (1977); see also *Dixon*, 509 U.S. at 704. Moreover, in *Witte*, *supra*, the Court indicated that *Blockburger* should apply in *successive* punishments cases such as this one. *Witte* involved a claim that the use in sentencing of conduct that had formed the basis of a previous conviction constituted multiple punishment. The Court observed that "the same [*Blockburger*] inquiry generally applies in both the multiple punishment and multiple prosecution contests." 515 U.S. at 396 (internal quotation marks and brackets omitted).

Application of *Blockburger* to successive-punishment claims is consistent with sound constitutional doctrine. If

(as the Court has held, see *Dixon*, 509 U.S. at 704), there is no basis for applying a test to successive-prosecution claims that is different from the test applied to claims of multiple punishments imposed at the same trial, then there surely can be no basis for applying a test to *successive*-punishment claims that is different from the test applied in both those other contexts. Indeed, it is difficult to see how the courts could apply one test (the *Blockburger* test) to determine whether a successive prosecution may go forward but apply some other test (such as a same-conduct test) to determine whether successive punishment may be applied in that prosecution. And attempts to define the "same offense" by reference to a "same conduct" or "same transaction" test have been rejected by the Court as unsound and unworkable. *Dixon*, 509 U.S. at 709-711 (overruling "same conduct" test of *Grady* v. *Corbin*, 495 U.S. 508 (1990), as "wrong in principle" and "unstable in application"); 509 U.S. at 709 n.14 ("Of course, the same-transaction test * * * has been consistently rejected by the Court.") (citations omitted).[24]

Petitioners argue (Br. 37-39) that in *Kurth Ranch*, *Halper*, and *United States* v. *La Franca*, 282 U.S. 568 (1931), the Court articulated a "same conduct" test for successive-punishment claims. In *Kurth Ranch*, however, the Court expressly declined to consider the State's argument that its tax on the possession of illegal drugs did not punish the same conspiracy offense to which five of the

[24] In *Kansas* v. *Hendricks*, 117 S. Ct. 2072 (1997), the Court, in the course of rejecting a double jeopardy claim, stated that "[t]he *Blockburger* test * * * simply does not apply outside of the successive prosecution context." *Id.* at 2086. That sentence should not be read as holding that some other test, such as a same-conduct test, applies to successive-punishment claims. In context, the Court in *Hendricks* simply rejected the conclusion that the civil commitment proceedings at issue there constituted an "offense" subject to double jeopardy "element" analysis.

defendants had pleaded guilty. 511 U.S. at 772 n.9. Thus, although the Court referred to the case as involving a tax and a criminal penalty "for the same conduct," *id.* at 769, it did not articulate a same-conduct rule for successive-punishment claims. In *Halper*, the district court granted summary judgment for the government on liability based on Halper's criminal conviction, see 490 U.S. at 438, and the government did not argue in this Court that the criminal and civil provisions of the False Claims Act were not the "same offense."

In *La Franca*, which was decided before *Blockburger*, the Court construed Section 5 of the Willis-Campbell Act, ch. 134, 42 Stat. 221, to permit prosecution of an act involving illegal liquor sales under either the National Prohibition Act, ch. 85, 41 Stat. 305, or any statute preexisting the Prohibition Act, but not both. See 282 U.S. at 575. The Court remarked that, if it were to construe the Willis-Campbell Act to permit both prosecution of liquor sales under the Prohibition Act and recovery of statutory penalties and taxes under the Revenue Act of 1918, ch. 18, 40 Stat. 1057 (reenacted in 1924, ch. 234, 43 Stat. 253), a "grave question" of constitutionality would be presented. 282 U.S. at 574. The Court also referred to two lower-court decisions that barred successive prosecutions under two different statutes for the same transactions, even though the two statutes might not have defined the "same offense" under *Blockburger*.[25] The fact that the Court

[25] See 282 U.S. at 574 (discussing *United States* v. *McKee*, 26 F. Cas. 1116 (C.C.E.D. Mo. 1877) (No. 15,688) and *United States* v. *Gates*, 25 F. Cas. 1263 (S.D.N.Y. 1845) (No. 15,191)). *La Franca* also relied (282 U.S. at 573-574) on *United States* v. *Chouteau*, 102 U.S. 602 (1880), but that case is clearly inapposite here. In *Chouteau*, the government and the defendant entered into a settlement of a criminal case, by which the defendant agreed to pay a statutory penalty; the government subsequently sought to collect the same penalty from the defendant's surety. The Court held that the government could not seek

recognized the existence of a constitutional *question* in the case, however, does not mean that it necessarily believed that the Double Jeopardy Clause would have been violated by the two proceedings. Accordingly, *La Franca* does not dictate that a same-conduct, rather than same-elements, test, governs successive-punishment claims of double jeopardy.

2. Application of *Blockburger* leads to the conclusion that petitioners cannot meet the "same offense" requirement of the Double Jeopardy Clause. In the administrative proceeding, OCC relied on its authority under 12 U.S.C. 93 and 504 (1982) to assess monetary sanctions against the defendants for violations of 12 U.S.C. 84 and 375b (1982) and 12 C.F.R. 31.2 and 215.4 (1986). To establish a violation of 12 U.S.C. 84, OCC must show that (1) the total loans and extensions of credit (2) from a national banking association (3) exceeded 15% of the unimpaired capital of the bank if the loans are unsecured or 10% of the unimpaired capital if the loans are secured. A violation of 12 U.S.C. 375b and 12 C.F.R. 31.2(b) and 215.4(b) occurs when (1) a national bank (2) extends credit to an executive officer, director, principal shareholder, or company controlled by such a person, (3) in an amount that exceeds 5% of the bank's capital and unimpaired surplus (4) unless a majority of the bank's board of directors grants prior approval in a vote in which the interested party abstains.[26]

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to recover the penalty a second time because "the compromise pleaded covers the penalties here claimed." *Id.* at 610.

[26] Section 375b(2) imposes limitations on loans in an amount that exceeds the amount prescribed "in a regulation of the appropriate Federal banking agency." OCC and the Federal Reserve Board promulgated the implementing regulations in 12 C.F.R. 31.2(b) and 215.4(b) respectively. Although the two regulations differ slightly in their wording, they have the same import and effect. See pp. 15a-17a, *infra*.

Even under the assumption that a civil provision can define an "offense," none of these provisions is the same offense as any of those charged in the indictment.[27] First, the conspiracy offense defined by 18 U.S.C. 371 is not the "same offense" as the banking statutes and regulations violated by petitioners. To prove a violation of Section 371, the government must show that the conspirators agreed to commit the object offenses, and that an overt was committed in furtherance of the conspiracy. None of the banking provisions requires the government to prove an agreement to violate federal law. Moreover, "a substantive crime and a conspiracy to commit that crime are not the 'same offence' for double jeopardy purposes." *United States* v. *Felix*, 503 U.S. 378, 389 (1992).

The offense defined by 18 U.S.C. 656 also is not the same as the "offenses" defined by the civil banking provisions in Title 12. The civil banking provisions prohibit bank officers from making any loans to any single borrower beyond certain capital limits and from making unauthorized loans to insiders beyond other capital limits. A violation of those restrictions may be established without proof of intent; a negligent infraction of the lending limits will violate 12 U.S.C. 84 and 375b. And under 12 U.S.C. 93(b) and 504, the Comptroller may impose a civil penalty for violations of 12 U.S.C. 84 and 375b without finding that the responsible party acted willfully and with fraudulent intent.

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[27] Petitioners appear to acknowledge that prosecution of Rackley under 18 U.S.C. 1005 would be permitted under the *Blockburger* test. See Pet. Br. 41-44. A Section 1005 charge requires proof that the defendant made a false entry in the records of a federally protected bank. None of the banking provisions at issue here contains that element, but each of those provisions requires proof of elements not present in Section 1005 (such as proof that a loan exceeded a lending limit, or was made to a bank insider).

By contrast, Section 656 prohibits willful misapplication of bank funds with the intent to defraud the bank or federal regulators.[28] See *United States* v. *Haddock*, 961 F.2d 933, 934-935 (10th Cir.), cert. denied, 506 U.S. 828 (1992); *United States* v. *Unruh*, 855 F.2d 1363, 1368 (9th Cir. 1987), cert. denied, 488 U.S. 974 (1988); *United States* v. *Arthur*, 544 F.2d 730, 736 (4th Cir. 1976); *United States* v. *Giordano*, 489 F.2d 327, 330 (2d Cir. 1973). Section 656 thus requires proof of mental state elements not required by the civil banking provisions. The banking provisions also contain essential elements that Section 656 lacks, such as proof that a loan exceeded applicable lending limits (in both provisions), and was made to an insider without board authorization (in the case of Section 375b). Neither of these elements is necessary to proof of misapplication in violation of Section 656; a violation of Section 656 may be predicated on any of a wide array of practices, such as check-kiting, diversion of bank proceeds to bribes, and knowingly honoring checks drawn without sufficient funds.[29] In this case, the government could prove a violation of Section 656 by showing that petitioners knowingly made loans to nominees who would not actually

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[28] We assume for purposes of this case that proof of intent to injure or defraud is required to establish the misapplication offense under Section 656, even though that is not a textual requirement of the statute. Compare *Bates* v. *United States*, No. 96-7185 (to be argued Oct. 7, 1997), in which the question presented is whether intent to injure or defraud the government is an element of 20 U.S.C. 1097(a), and see 96-7185 U.S. Br. at 26-27, discussing lower-court constructions of Section 656. Whether or not proof of intent to defraud is required would not affect the outcome of the *Blockburger* analysis in this case.

[29] See, *e.g.*, *Haddock*, *supra* (check-kiting); *Unruh*, *supra* (check-kiting and loans to uncreditworthy borrowers); *Arthur*, *supra* (alleged use of bank funds for bribes); *Giordano*, *supra* (check-kiting); *Logsdon* v. *United States*, 253 F.2d 12 (6th Cir. 1958) (honoring check drawn without sufficient funds).

control the loan proceeds, without showing that those loans exceeded the banks' lending limits or were made for the benefit of a bank insider. Thus, because misapplication of bank funds does not always require proof of violation of lending limits or loans to insiders, the two offenses are not the "same" under the *Blockburger* test.[30]

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[30] Petitioners concede that "the banking statutes do not *invariably* require proof of the same elements as do the criminal statutes," but argue that the issue is whether "in the circumstances of this particular case, the civil sanctions in fact rested on the same elements." Pet. Br. 41. That contention is incorrect, see *United States* v. *Woodward*, 469 U.S. 105, 107 (1985) (per curiam), and it is not supported by the cases on which petitioners rely (Br. 42). The Court did not decide *Illinois* v. *Vitale*, 447 U.S. 410, 419 (1980), based on the State's "actual trial theory" (Pet. Br. 42). The Court reserved decision there on whether the Double Jeopardy Clause would be violated if "a careless failure to slow [for which Vitale had already been convicted] is *always* a necessary element of manslaughter" (for which he stood charged). 447 U.S. at 419-420 (emphasis added). If Vitale had shown that failure to slow was an element of *every* case of manslaughter by automobile, not just his own case, then he might have had a double jeopardy claim. Nor does *Whalen* v. *United States*, 445 U.S. 684 (1980), support petitioners' argument. There, the Court concluded that Congress had not intended for cumulative punishments to be imposed for rape and felony murder (the killing having occurred during the commission of the rape). *Whalen*, however, rests in large part on the unusual nature of felony murder, which may be committed in the course of many felonies. The Court has generally not treated felony murder "as a separate offense distinct from its various elements." See *Vitale*, 447 U.S. at 420 (discussing *Harris* v. *Oklahoma*, 433 U.S. 682 (1977) (per curiam)). Thus, in *Whalen*, the Court construed felony murder committed during rape as an offense different from that of felony murder committed during arson, and concluded that the rape was a lesser-included offense of the felony murder-during-rape. See 445 U.S. at 694; see also *Dixon*, 509 U.S. at 707 ("*Vitale* unquestionably reads *Harris* as merely an application of the double jeopardy bar to lesser and greater included offenses.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
PAUL R.Q. WOLFSON
Assistant to the Solicitor General
J. DOUGLAS WILSON
JARED A. GOLDSTEIN
Attorneys

AUGUST 1997

Civil penalty provisions enacted by the Congress, 1789-1799

1. The first tonnage act, enacted July 31, 1789, provided a $500 penalty for a ship master who neglected to make certain entries in the ship's manifest. Act of July 31, 1789, ch. 5, § 11, 1 Stat. 39. See also § 12 ($400 penalty for unlading goods without a permit); § 25 (penalty for person who conceals goods subject to seizure, of double the value of the seizable goods); § 27 ($100 penalty for government officer who fails to post a rate of fees); § 36 ("That all penalties accruing by any breach of this act, shall be sued for and recovered with costs of suit, in the name of the United States, in any court proper to try the same.").

2. The statute establishing the first census provided a $20 penalty for false reporting by heads of households. Act of March 1, 1790, ch. 2 § 6, 1 Stat. 103. See also §§ 2, 3 (penalties for marshals and assistant marshals who fail to return their forms).

3. The first copyright statute provided a penalty of fifty cents a page for each page copied without permission. Act of May 31, 1790, ch. 15 § 2, 1 Stat. 124-125.

4. The statute creating the first Bank of the United States created a treble damages provision for corporations or persons making certain sales in violation of the act. Act of Feb. 25, 1791, ch. 10 § 8, 1 Stat. 195-196.

5. The act establishing duties on liquor importation created monetary penalties for illegal importation, for failing to make certain reports, and for false labelling of casks. Act of Mar. 3, 1791, ch. 15 §§ 9, 10, 27, 30, 1 Stat. 199-214.

6. The act prohibiting importing slaves provided a $2000 penalty for preparing a ship to engage in the slave trade and a $200 penalty for receiving persons on board to be sold as slaves. Act of Mar. 22, 1794, ch. 11 §§ 2,4, 1 Stat. 349.

7. Miscellaneous additional civil penalty provisions: Act of Sept. 1, 1789, ch. 11 § 24, 1 Stat. 61 ($200 penalty for sailing without a manifest); Act of July 20, 1790, ch. 29 § 4, 1 Stat. 133 ($10 penalty for harboring runaway seamen); Act of Aug. 4, 1790, ch. 35 § 13, 1 Stat. 157 ($1000 penalty for unlading goods without certification); Act of Mar. 3, 1791, ch. 15 § 10 ($500 penalty for importing liquor without a certificate); Act of Feb. 20, 1792, ch. 7, § 11, 1 Stat. 235 ($100 penalty for private letter carriers); Act of May 8, 1792, ch. 31 § 13, 1 Stat. 270 ($250 penalty for operating a still without a certificate); Act of May 8, 1792, ch. 39 § 2, 1 Stat. 284 ($10 penalty for using unminted copper coins); Act of Dec. 31, 1792, ch. 1 § 26, 1 Stat. 298 ($1000 penalty for government officers who charge unlawful fees); Act of Feb. 12, 1793, ch. 7 § 4, 1 Stat. 305 ($500 penalty for aiding escaped slaves); Act of Feb. 18, 1793, ch. 8 § 3, 1 Stat. 306 ($100 penalty for ship master who fails to register fishing ship); Act of Mar. 2, 1793, ch. 34 § 5, 1 Stat. 337 ($500 penalty for revenue officers who have personal interest in the importation of goods); Act of May 8, 1794, ch. 23 § 14, 1 Stat. 360 ($50 penalty for private letter carriers); Act

of June 5, 1794, ch. 48 § 2, 1 Stat. 377 ($50 penalty for selling wine without a license); Act of June 5, 1794, ch. 49 § 5, 1 Stat. 379 ($50 penalty for selling casks of liquor with defaced inspection marks); Act of June 5, 1794, ch. 51 § 4, 1 Stat. 385 ($500 penalty for manufacturing snuff or sugar without making report); Act of June 9, 1794, ch. 45 §3, 1 Stat. 398 ($400 penalty for auctioneers who fail to give a bond); Act of Feb. 26, 1795, ch. 31 § 1, 1 Stat. 420 ($50-500 penalty for obstructing inspection of importing vessel); Act of Mar. 3, 1795, ch. 43 § 7, 1 Stat. 428 (treble-duty penalty for manufacturing snuff without a license); Act of April 18, 1796, ch. 13 § 7, 1 Stat. 453 ($100 penalty for government agents who trade guns with Indians); Act of May 28, 1796, ch. 36 §6, 1 Stat. 478 ($100 penalty for ship masters who neglect to take oath of compliance with statute); Act of June 1, 1796, ch. 45 § 4, 1 Stat. 490 ($200 penalty for ship masters sailing without ship passport); Act of July 6, 1797, ch. 11 §4, 1 Stat. 528-529 ($20 penalty for insurers who neglect to make out policy for ships); Act of Jan. 23, 1798, ch. 8 § 3, 1 Stat. 537 ($20 penalty for witnesses failing to respond to summons); Act of Apr. 7, 1798, ch. 28 § 7, 1 Stat. 550 ($300 penalty for bringing slaves into Mississippi); Act of June 18, 1798, ch. 54 § 3, 1 Stat. 567 ($10 penalty on clerks who neglect to issue naturalization certificate); Act of June 25, 1798, ch. 58 § 3, 1 Stat. 571 ($300 penalty for ship masters who neglect to report aliens on board); Act of July 9, 1798, ch. 70 § 14, 1 Stat. 587 ($100 penalty for slaveowners neglecting to provide an enumeration of slaves); Act of July 16, 1798, ch. 77 § 2, 1 Stat. 606 ($100 penalty for ship master falsely reporting the number of seamen employed); Act of Feb. 28, 1799, ch. 17 § 2, 1 Stat. 622-623 (maximum $100 penalty for signing foreign bills without a

proper stamp); Act of Mar. 2, 1799, ch. 22 § 30, 1 Stat. 651 ($1000 penalty for ship master neglecting to make certain reports); Act of Mar. 2, 1799, ch. 43 § 12, 1 Stat. 735 ($50 penalty for private letter carriers).

APPENDIX B

1. Section 84 of Title 12, United States Code (1982 ed.) provided, in pertinent part:

§ 84. Lending limits

(a) Total loans and extensions of credit

(1) The total loans and extensions of credit by a national banking association to a person outstanding at one time and not fully secured, as determined in a manner consistent with paragraph (2) of this subsection, by collateral having a market value at least equal to the amount of the loan or extension of credit shall not exceed 15 per centum of the unimpaired capital and unimpaired surplus of the association.

(2) The total loans and extensions of credit by a national banking association to a person outstanding at one time and fully secured by readily marketable collateral having a market value, as determined by reliable and continuously available price quotations, at least equal to the amount of the funds outstanding shall not exceed 10 per centum of the unimpaired capital and unimpaired surplus of the association. This limitation shall be separate from and in addition to the limitation contained in paragraph (1) of this subsection.

(b) Definitions

For the purposes of this section—

(1) the term "loans and extensions of credit" shall include all direct or indirect advances of funds to a person made on the basis of any obligation of that person to repay the funds or repayable from specific property pledged by or on behalf of the person and, to

the extent specified by the Comptroller of the Currency, such term shall also include any liability of a national banking association to advance funds to or on behalf of a person pursuant to a contractual commitment; and

(2) the term "person" shall include an individual, sole proprietorship, partnership, joint venture, association, trust, estate, business trust, corporation, sovereign government or agency, instrumentality, or political subdivision thereof, or any similar entity or organization.

* * * * *

(d) Authority of Comptroller of the Currency

(1) The Comptroller of the Currency may prescribe rules and regulations to administer and carry out the purposes of this section including rules or regulations to define or further define terms used in this section and to establish limits or requirements other than those specified in this section for particular classes or categories of loans or extensions of credit.

(2) The Comptroller of the Currency also shall have authority to determine when a loan putatively made to a person shall for purposes of this section be attributed to another person.

2. Section 93 of Title 12, United States Code (1982 ed.) provided, in pertinent part:

§ 93. Violations of provisions of chapter; forfeiture of franchise; personal liability of directors; civil money penalty

(a) If the directors of any national banking association shall knowingly violate, or knowingly permit

any of the officers, agents, or servants of the association to violate any of the provisions of this chapter, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper district or Territorial court of the United States in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.

(b)(1) Any national banking association which, and any institution-affiliated party (within the meaning of section 1813(u) of this title) with respect to such association who, violates any provision of this chapter or any of the provisions of section 92a of this title, or any regulation issued pursuant thereto, shall forfeit and pay a civil penalty of not more than $5,000 for each day during which such violation continues. The penalty may be assessed and collected by the Comptroller of the Currency by written notice. As used in the section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

(2) In determining the amount of the penalty the Comptroller shall take into account the appropriateness of the penalty with respect to the size of financial resources and good faith of the association or person charged, the gravity of the violation, the

history of previous violations, and such other matters as justice may require.

* * * * *

(6) The Comptroller may, in his discretion compromise, modify, or remit any civil money penalty which is subject to imposition or has been imposed under this section.

(7) The Comptroller shall promulgate regulations establishing procedures necessary to implement this subsection.

3. Section 375b of Title 12, United States Code (1982 ed.) provided, in pertinent part:

§ 375b. Prohibitions respecting loans and extensions of credit to executive officers and directors of banks, political or campaign committees, etc.

(1) No member bank shall make any loan or extension of credit in any manner to any of its executive officers, or to any person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of such member bank, except in the case of such a bank located in a city, town, or village with less than thirty thousand in population, in which case such per centum shall be 18 per centum, or to any company controlled by such an executive officer or person, or to any political or campaign committee the funds or services of which will benefit such an executive officer or person or which is controlled by such an executive officer or person, where the amount of such loan or extension of credit, when aggregated with the

amount of all other loans or extensions of credit then outstanding by such bank to such executive officer or person and to all companies controlled by such executive officer or person and to all political or campaign committees the funds or services of which will benefit such executive officer or person or which are controlled by such executive officer or person, would exceed the limits on loans to a single borrower established by section 84 of this title. For purposes of this paragraph, the provisions of section 84 of this title shall be deemed to apply to a State member bank as if such State member bank were a national banking association.

(2) No member bank shall make any loan or extension of credit in any manner to any of its executive officers or directors, or to any person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of such member bank, or to any company controlled by such an executive officer, director, or person, or to any political or campaign committee the funds or services of which will benefit such executive, director, or person or which is controlled by such executive officer, director, or person, where the amount of such loan or extension of credit, when aggregated with the amount of all other loans or extensions of credit then outstanding by such bank to such executive officer, director, or person and to all companies controlled by such executive officer, director, or person or which are controlled by such executive officer, director, or person, would exceed an amount prescribed in a regulation of the appropriate Federal banking agency, unless such loan, line of

credit, or extension of credit is approved in advance by a majority of the entire board of directors with the interested party abstaining from participating directly or indirectly in the voting.

(3) No member bank shall make any loan or extension of credit in any manner to any of its executive officers or directors, or to any person who directly or acting through or in concert with one or more persons, owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of such member bank, or to any company controlled by such executive officer, director, or person, or to any political or campaign committee the funds or services of which will benefit such executive officer, director, or person, or which is controlled by such executive officer, director, or person, unless such loan or extension of credit is made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

(4) No member bank may pay an overdraft on an account at such bank of an executive officer or director.

(5) For purposes of this section, an executive officer, director, or person shall be considered to have control of a company if such executive officer, director, or person, directly or indirectly or acting through or in concert with one or more other persons.

(A) owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the company;

(B) controls in any manner the election of a majority of the directors of the company; or

(C) has the power to exercise a controlling influence over the management or policies of such company.

(6) For the purposes of this section—

(A) the term "person" means an individual or company;

(B) the term "company" means any corporation, partnership, business trust, association, joint venture, pool syndicate, sole proprietorship, unincorporated organization, any other form of business entity not specifically listed herein, or any other trust, but shall not include any insured bank or any corporation the majority of shares of which is owned by the United States or by any State;

(C) a person shall be deemed to be a "director" of a member bank or a "person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has power to vote more than 10 per centum of any class of voting securities of a member bank" if such person has such relationship with any bank holding company of which such member is a subsidiary, as defined by the Bank Holding Company Act (12 U.S.C. 1841), or with any other subsidiary of such bank holding company;

(D) a person shall be deemed to be an "officer" of a member bank if such person is an officer of any bank holding company of which such member bank is a subsidiary, as defined by the Bank Holding Company Act (12 U.S.C. 1841), or with any other subsidiary of such bank holding company;

(E) the term "executive officer" has the same meaning assigned such term under section 375a of this title; and

(F) the term "pay an overdraft on an account" means the payment by a member bank of an amount for an account holder in excess of the funds on deposit in the account and does not include a payment of funds by the member bank in accordance with either a written preauthorized, interest-bearing extension of credit specifying a method of repayment or a written preauthorized transfer of funds from another account of the account holder at that bank.

* * * * *

(7) The Board of Governors of the Federal Reserve System may prescribe such rules and regulations, including definitions of terms, as it deems necessary to effectuate the purposes and to prevent evasions of this section. The Board may further prescribe rules providing a reasonable period of time after November 10, 1978, within which the amount of outstanding loans or extensions of credit made prior to November 10, 1978, shall be reduced so as to conform to the limitations of this section.

4. Section 504 of Title 12, United States Code (1982 ed.) provided, in pertinent part:

§ 504. Civil penalty

(a) Making loans, extensions of credit, purchases of securities, etc., respecting affiliates, executive officers, etc.

Any member bank which violates or any officer, director, employee, agent, or other person participat-

ing in the conduct of the affairs of such member bank who violates any provision of section 371c, 375, 375a, 375b, 376, or 503 of this title, or any regulation issued pursuant thereto, shall forfeit and pay a civil penalty of not more than $1,000 per day for each day during which such violation continues: *Provided*, That the agency having authority to impose a civil money penalty may, in its discretion, compromise, modify, or remit any civil money penalty which is subject to imposition or has been imposed under such authority. The penalty may be assessed and collected by the Comptroller of the Currency in the case of a State member bank, by written notice. As used in this section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about participating in, counseling, or aiding or abetting a violation.

(b) Amount of penalty

In determining the amount of the penalty the Comptroller of the Currency or the Board, as the case may be, shall take into account the appropriateness of the penalty with respect to the size of the financial resources and good faith of the member bank or person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require.

5. Section 371 of Title 18, United States Code provides, in pertinent part:

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any

manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

6. Section 656 of Title 18, United States Code provides, in pertinent part:

§ 656. Theft, embezzlement, or misapplication by bank officer or employee

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, depository institution holding company, national bank, insured bank, branch or agency of a foreign bank, or organization operating under section 25 or section 25(a) of the Federal Reserve Act or a receiver of a national bank, insured bank, branch, agency, or organization or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank, branch, agency, or organization or holding company or any moneys, funds, assets or securities intrusted to the custody or care of such bank, branch, agency, or organization, or holding company or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined under this title or imprisoned not more than one year, or both.

7. Section 1005 of Title 18, United States Code provides, in pertinent part:

§ 1005. Bank entries, reports and transactions

Whoever makes any false entry in any book, report, or statement of such bank, company, branch, agency, or organization with intent to injure or defraud such bank, company, branch, agency, or organization, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, company, branch, agency, or organization, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent to examiner appointed to examine the affairs of such bank, company, branch, agency, or organization, or the Board of Governors of the Federal Reserve System;

Shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

8. Section 31.2 of Title 12, Code of Federal Regulations (1986 ed.), provided, in pertinent part:

§ 31.2 Loan limits.

(a) A national bank is authorized to extend credit (which term includes granting a line of credit) to an executive officer or purposes other than those specifically authorized under 12 U.S.C. 375a in an aggregate amount that does not exceed at any one time the higher of $25,000 or 2.5 per cent of the bank's capital and unimpaired surplus, but in no event more than $100,000.

(b) No national bank shall extend credit to any of its executive officers, directors, or principal shareholders or to any related interest of that person in an amount that, when aggregated with the amount of all

other extensions of credit to that person and to all related interests of that person, exceeds the higher of $25,000 or 5 per cent of the bank's capital and unimpaired surplus, unless: (1) The extension of credit has been approved in advance by a majority of the entire board of directors of that bank, and (2) the interested party has abstained from participating directly or indirectly in the vote. In no event shall a national bank extend credit to any of its executive officers, directors, or principal shareholders or to any related interest of that person in an amount that, when aggregated with the amount of all other extensions of credit to that person and all related interests of that person, exceeds $500,000, except by complying with the requirements in paragraphs (b)(1) and (2) of this section.

94. Section 215.4 of Title 12, Code of Federal Regulations (1986 ed.), provides, in pertinent part:

§ 215.4 General prohibitions.

(a) *Terms and creditworthiness.* No member bank may extend credit to any its executive officers, directors, or principal shareholders or to any related interest of that person unless the extension of credit:

(1) Is made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable transactions by the bank with other persons that are not covered by this part and who are not employed by the bank, and (2) does not involve more than the normal risk of repayment or present other unfavorable features.

(b) *Prior approval.* (1) No member bank may extend credit (which term includes granting a line of credit) to any of its executive officers, directors, or

principal shareholders or to any related interest of that person in an amount that, when aggregated with the amount of all other extensions of credit to that person and to all related interests of that person, exceeds the higher of $25,000 or 5 percent of the member bank's capital and unimpaired surplus, unless:

(i) The extension of credit has been approved in advance by a majority of the entire board of directors of that bank, and (ii) the interested party has abstained from participating directly or indirectly in the voting. In no event may a member bank extend credit to any one of its executive officers, directors, or principal shareholders, or to any related interest of that person, in an amount that, when aggregated with all other extensions of credit to that person, and all related interests of that person, exceeds $500,000, except by complying with the requirements of this paragraph.

(2) Approval by the board of directors under paragraph (b)(1) of this section is not required to an extension of credit that it made pursuant to a line of credit that was approved under paragraph (b)(1) of this section within 14 months of the date of the extension of credit. The extension of credit must also be in compliance with the requirements of § 215.4() of this part.

(3) Participation in the discussion, or any attempt to influence the voting, by the board of directors regarding an extension of credit constitutes indirect participation in the voting by the board of directors on an extension of credit.

(10)

Supreme Court, U.S.
FILED
SEP 24 1997
CLERK

No. 96-976

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JOHN HUDSON, LARRY BARESEL, and
JACK BUTLER RACKLEY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit**

REPLY BRIEF FOR PETITIONERS

C. MERLE GILE
2200 N. Classen Boulevard
2000 Citizen's Tower
Oklahoma City, OK 73106

JAMES A. ROLFE
2821 Routh Street
Dallas, TX 75201

LYNN PRINGLE
PRINGLE & PRINGLE
4101 N. Classen Boulevard
Oklahoma City, OK 73118

JACK L. NEVILLE, JR.
BERNARD J. ROTHBAUM *
LINN & NEVILLE, P.C.
1200 Bank of
Oklahoma Plaza
201 Robert S. Kerr Avenue
Oklahoma City, OK 73102
(405) 239-6781
Counsel for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

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REPLY BRIEF FOR PETITIONERS

I. THE COURT SHOULD DECIDE THE DOUBLE JEOPARDY QUESTION PRESENTED BASED UPON THE PUNISHMENT ACTUALLY IMPOSED ON PETITIONERS AND THE GOAL THE PUNISHMENT SOUGHT TO ACHIEVE

(1) Respondent does not squarely address the punishment actually imposed upon petitioners by the Office of the Comptroller of the Currency ("OCC") in this case: substantial monetary penalties *and* lifetime bars from participation in the banking industry.[1] The government passes over the evidence *from OCC itself* that these two-

---

[1] Under the "non-participation" orders, petitioners are barred from the industry absent the "prior written consent" of the regulatory agencies (Pet. App., p. 197a, *et seq.*).

pronged penalties had been imposed on petitioners with the goal of "preventing these individuals from ever reentering the banking industry *and*, through publicity of these actions, hopefully deter *other individuals* from similar conduct." Pet. App., p. 13a (emphasis added).[2] The government, instead, discusses what are now described as "conduct-shaping" penalties imposed to "induc[e] compliance with regulatory objectives." (*e.g.*, Br., p. 9-10, 23-24). At the same time, respondent repeatedly expresses concern that acceptance of petitioners' submission would require the government to "elect" between civil and criminal penalties, thereby "hampering the flexible use of civil money penalties" (Br., p. 14, 24, 34).

As to the first point, the money penalties in this case are not "conduct-shaping," were not imposed to "encourage compliance with a regulatory regime" (Gov. Br., p. 16) and cannot be justified by simply asserting there is a "rational connection" between imposing money penalties and the "goal of protecting the banking system." (Gov. Br., p. 38). *See, e.g., Trop v. Dulles*, 356 U.S. 86, 95 (1958) (Plurality): The "penal effect" of "a statute providing that 'a person shall lose his liberty by committing bank robbery' . . . [would not] be altered by labeling it a regulation of banks or by arguing that there is a rational connection between safeguarding banks and imprisoning bank robbers." As to the latter point, there are three responses. First, the asserted desire for "flexibility" should not justify a declination to apply the Double Jeopardy Clause. In *Breed v. Jones*, 421 U.S. 519 (1975), for example, the Court unanimously rejected the contention the Clause should not apply to juvenile court proceedings because juvenile proceedings are designed to benefit

[2] Contrary to the government's intimation (Gov. Br., p. 33), the district court did not conduct any "inquiry into the subjective purposes" that motivated the OCC. The district court simply reviewed the testimony presented, received the exhibits offered into evidence and made factual findings accordingly. There is nothing "subjective" about such straightforward fact finding.

youthful offenders and imposing double jeopardy scrutiny "'would diminish the flexibility . . . of juvenile court proceedings. . .'." *Id.*, at 532. The "burdens" envisioned could not, the Court held, "justify a departure . . . from the fundamental prohibition against double jeopardy." *Id.*, at 537. Second, the government's concern with regard to "hampering . . . flexible . . . penalty schemes" (Gov. Br., pp. 27-28) has no application to this case—there is nothing "flexible" about the penalties imposed upon petitioners. Third: a genuinely "flexible" money penalty would almost surely be remedial, rather than punitive, in nature. The facts of this case offer an excellent illustration of the last point.

OCC believed petitioners were responsible for certain lending violations at banks petitioners controlled. The alleged violations, among other things, reduced the capital of the banks below mandatory minimum levels. If OCC had ordered petitioners to correct the existing deficiencies within a stated period of time and, thereafter, to pay to the bank at which the violations continued the sum of $1,000 for each day the violations went uncorrected, the sanction would very likely be held remedial.

The obvious analogy would be to the law of contempt. The Court has long held that the two most important benchmarks in determining whether a contempt proceeding is remedial or punitive are the identity of the party to whose benefit the order inures and the indeterminate nature of the sanction. If the order benefits primarily the party suffering injury, rather than the government, and if the penalty may be avoided by compliance, the proceeding is remedial. *Hicks v. Feiock*, 485 U.S. 624, 633 (1988) ("'[o]ne who is fined unless by a day certain he [does the act ordered] has it in his power to avoid any penalty'"); *Accord, United States v. United Mine Workers*, 330 U.S. 258, 304 (1947). If OCC had imposed such a sanction, the criteria for "remediation" would appear to be present:

the order would benefit the allegedly aggrieved party (the bank) and the penalty could be avoided by compliance.

The government contends (Gov. Br., p. 18) that "the double jeopardy analysis must be tailored to the nature of the sanction at issue." Assuming for the argument that this premise may be valid, the money penalties in *this* case *could not* have had "the goal of . . . 'motivating future behavior' " (*id.*) of petitioners. Since petitioners were barred from participating in the banking industry, the additional exaction of fixed money penalties for alleged *past* acts could have had *no* non-punitive purpose. And, as *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 779 (1994) and *United States v. Halper*, 490 U.S. 435, 447-48 and n.7 (1989) hold, the multiple punishment issue depends upon the "*purposes actually served* by the sanction in question . . . *as applied in the individual case.*" (emphasis added).

In *this* case, the district court found (Pet. App., p. 14a), that "the monetary penalties [imposed upon petitioners] were punitive in nature." The government does not challenge the sufficiency of the evidence supporting this finding. Indeed, only in a passing footnote (Gov. Br., p. 27, n.17) does the government advert to the actual sanctions imposed upon petitioners here. The government acknowledges that, given the non-participation orders, petitioners are "no longer . . . in a position to commit further violations. . . ." But the government states, this "does not convert the deterrent impact of the civil penalties into punitive sanctions." (*Ibid.*) The assertion is an obvious *non sequitur:* once petitioners were barred for life from participating in the banking industry, the imposition of monetary penalties for alleged past acts on top of the bar orders could have had *no* purpose other than to impose retribution and to publicize the fact of that retribution as an example to others. The goals of retribution and of creating an example of a defendant in order to deter others go to the core of the concept of "punishment" as it is

known in our society. *See, e.g., Halper*, 490 U.S., at 440-41; *United States v. Reorganized CF&I Fabricators of Utah*, 116 S.Ct. 2106, 2113 (1996).

(2) The penalties at issue here are different in kind, not merely in degree, from monetary remedies designed to afford the government full financial compensation for an injury or to deprive a wrongdoer of "ill-gotten" gains. The penalties here were imposed even though "the United States was not a victim . . . and therefore none of the fines can be justified as a remedy." *S.A. Healy Co. v. OSHRC*, 96 F.3d 906, 910 (7th Cir.) *pet. for cert. pending*, No. 96-1299. As Judge Easterbrook explained, fines imposed under a statute which *requires* an evaluation of punitive factors—the seriousness of the alleged misconduct, whether the defendant has previously committed similar violations and the defendant's ability to pay—constitute a "*means* [of enforcement which] is punitive, even though the *end*" may be beneficient. (*Id.*, at 911).

(3) Recognition of the proper result on the facts here, moreover, would not have the sweeping and dire consequences predicted by respondent (*see*, Gov. Br., pp. 14, 24). As discussed above, the regulatory agencies presumably may impose truly "flexible," remedial civil money penalties analogous to the indeterminate orders issued regularly in civil contempt cases. Moreover, the government will remain free to seek nonparticipation or "bar" orders banning a defendant from participation in a regulated industry. In instances in which the government has suffered a pecuniary loss to a property or proprietary interest, it may seek compensation (including double damages) through any of the numerous statutes which Congress has enacted for that purpose. In a proper case, the government may also seek to recover "ill-gotten" gains. In this case, however, the government suffered no financial injury from the alleged acts of petitioners; was not seeking to require any form of "disgorgement"; had already achieved all the deterrence of petitioners which is possible; and had imposed

"unconditional penalt[ies] . . . which [are] exclusively punitive in character." *Hicks*, 485 U.S., at 633.[3]

II. THE JEOPARDY QUESTION AT ISSUE HERE INVOLVES JEOPARDY OF MULTIPLE PUNISHMENT, NOT JEOPARDY OF MULTIPLE PROSECUTION

(1) The protection against multiple prosecution and the protection against multiple punishment are distinct and require discrete analysis. *Compare, United States v. La Franca*, 282 U.S. 568 (1931) *with, Helvering v. Mitchell*, 303 U.S. 391 (1938).

It is the methodology of *La Franca*, a multiple punishment case, rather than *Mitchell*, a multiple prosecution case, which is relevant here. Like petitioners in this case, the defendant in *La Franca* did *not* contest the validity of the fine imposed in the prior proceeding; *nor* did he contest the use of a civil proceeding—as opposed to a criminal prosecution—to obtain punishment. Rather, the defendant argued that the protection against multiple punishment precluded a second fine for the same conduct, regardless of the label—civil or criminal—put upon the proceedings. The Court unanimously agreed. To avoid the "grave constitutional question" that would be presented if the defendant were punished a second time, the Court

[3] Petitioners do not here contend that imposition of the non-participation sanctions, alone, would necessarily have precluded a subsequent indictment, because it is unnecessary to do so in this case. It should be noted, however, that while "courts have understood [*United States v.*] *Halper* [490 U.S. 435 (1989)] to allow debarment sanctions . . . for the purpose of protecting the banking system and financial markets . . . from future harm" (*Healy*, 96 F.3d at 911), the government errs in the unqualified assertion that debarment can never constitute punishment. In *Wisconsin v. Gould, Inc.*, 475 U.S. 282 (1986) the Court unanimously held that a "debarment law which function[ed] unambiguously as a . . . sanction for violations of" a federal statute was "punishment." *Id.* at 288 and n.5.

construed a statutory provision barring further "prosecution" of those convicted under a criminal statute to preclude the civil action as well. The Court "assume[d]" that such a "penalty may be recovered in a civil action as well as a criminal prosecution . . . ." The assumption, however, did not assist the government because, *regardless* of whether the punishment was imposed in a civil or criminal action, "it is still . . . punishment for the infraction of the law. The term 'penalty' involves the idea of punishment, and *its character is not changed by the mode in which it is inflicted*, whether by a civil action or a criminal prosecution. *Id.*, at 573, *quoting, United States v. Chouteau*, 102 U.S. 603, 611 (1881) (emphasis supplied).

Mitchell, a case involving the protection against multiple prosecution, presented a substantially different question, and generated a correspondingly different analysis. The defendant in *Mitchell* had been indicted for tax fraud. He was acquitted. Thereafter, the government brought a proceeding against the defendant to recover unpaid taxes together with a fifty percent enhancement for taxes whose payment had been evaded by fraud. Since the first proceeding against the defendant had ended in an acquittal, there was no issue of multiple punishment in the case. Rather, the defendant could prevail only by demonstrating that the second proceeding was *inherently* criminal.

The Court concluded that this heavy burden was not met. The focus was upon the "nature" of the action and the "purpose" of Congress, rather than upon the defendant, because there was no issue of multiple punishment. By contrast, in a case such as *La Franca*, as here, the question was simply whether the defendant had been previously punished.

The government's failure to draw this distinction leads it to several erroneous, or irrelevant, conclusions. Thus, the government suggests that civil money penalties should not be held to be "inherently criminal" (Gov. Br., p. 21) because the courts have "uniformly" permitted the collection

of such penalties "by civil proceedings." (*Id.*, pp. 22, 26). Yet, as the government recognizes, these holdings resulted from "claims that [the] penalties could *only* be collected through criminal proceedings." (Gov. Br., p. 22). (emphasis supplied).

A contention that *all* proceedings under a nominally civil statute must be deemed to be "inherently" criminal is a sweeping one. It is, therefore, understandable that the Court has insisted upon the "clearest proof" before reaching such a conclusion. *United States v. Ward*, 448 U.S. 242, 249 (1980). We emphasize that *no such question* is presented here. Petitioners do not challenge the imposition of punishment by OCC on the theory that the punishment could only be obtained through a criminal prosecution. Petitioners assert only that, on the facts of *this* case, the proceeding before the Comptroller *resulted* in punishment, regardless of "the mode by which it [was] inflicted." *La Franca*, 282 U.S., at 573.[4]

(2) The claim asserted by petitioners here cannot be answered by reference to cases such as *Ward* or *Mitchell*. Indeed, in *Halper*, the Court was unanimous in holding that the "abstract approach" of *Ward* was not well suited to the "context of the 'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments." 490 U.S., at 447. Rather, a multiple punishment claim can be resolved "only by assessing the character of the actual sanctions imposed. . . ."[5] *Ibid.* Thus,

[4] The holding of cases such as *Stockwell v. United States*, 80 U.S. (13 Wall.) 531, 541 (1871) that Congress has the power to authorize a civil action to collect penalties for illegal importation of goods although "an indictment or information [for same violation] might be sustained" is assuredly not a holding that both "modes" of proceeding could be invoked and the penalty recovered twice.

[5] Oddly, while the government relies upon the "test" of *Ward* (Gov. Br., p. 25) the government never mentions the fact that this

the list of criteria set forth in *Ward*, relying upon *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), does not apply here.[6]

If, however, the *Ward* factors are thought to have any relevance to the present case, it is important to bear in mind that the government's discussion does not address the facts of *this* case. Thus, the government states that penalties under 12 U.S.C. §§ 93(b) and 504 do not require a finding of *scienter* and may be imposed for mere negligence (Gov. Br., pp. 28-29). The OCC does not agree. OCC's position is that penalties as serious as those imposed upon petitioners are reserved for cases of alleged "willful misconduct" only. (Pet. App., p. 62a). The government's suggestion (Gov. Br., p. 28) that the fines might have been imposed for the purpose of "deterrence" and "to remove a profit incentive . . . to encourage *ongoing* compliance with the law" is *entirely* unsupported by the record. Since petitioners were banned from the industry, fines for alleged past acts self-evidently could serve neither as a "deterrent" nor to "encourage *ongoing* compliance" with a regulatory scheme governing the very industry from which petitioners had been barred. (emphasis supplied).

The government's failure to address the actual punishment imposed in this case is particularly striking in light of the emphasis of the Court in both *Halper* and *Kurth Ranch* that, in this context, the question whether a given sanction is a "punishment" can be answered only by "a particularized assessment" (*Halper*, 490 U.S., at 448) of the penalty imposed "*as applied in the individual case*."

is the same position which it took in *Halper* (490 U.S. 446-47) and which the Court rejected.

[6] The distinction between the two situations is highlighted by the fact that neither *Ward* nor *Mendoza-Martinez* involved any double jeopardy claim at all. *Ward* considered whether a nominally civil proceeding was sufficiently penal to trigger the self-incrimination clause; *Mendoza-Martinez* presented the question whether certain punishments are so drastic that they may only be imposed in criminal proceedings.

(*Ibid.*). This "evaluation of the *purposes actually served*" (490 U.S., at 447, n.7) by such sanctions necessarily requires a case-by-case inquiry. *Id. Accord, Kurth Ranch*, 511 U.S. 779. The "evaluation" required by this Court's precedents of the facts actually presented by the record is what petitioners seek.

Thus, the government's request (Gov. Br., p. 30) that penalties imposed under 12 U.S.C. §§ 93(b) and 504 not be held to be "invariably and inherently 'punitive'." misses the relevant point. Petitioners do not assert that penalties under sections 93(b) and 504 are "invariably and inherently 'punitive'." Indeed, we have offered above an example of a "flexible" use of these statutes which could reasonably be deemed remedial. Petitioners contend only that the "particularized inquiry" into the "purposes actually served" by the penalties imposed in this case demonstrates that the impositions here were "punishment" for double jeopardy purposes.

(3) The government's recapitulation of the enactment of money penalty statutes by early English and American legislatures (Gov. Br., pp. 21-23) arrives at the wrong answer because it asks the wrong question. The issue is *not* whether a civil proceeding may be used to collect money penalties. The relevant inquiry is whether the Double Jeopardy Clause was understood to permit *both* a proceeding to collect a monetary penalty in civil proceedings *and* an additional punishment in a separate proceeding.

The answer appears clearly to be negative. While there are few reported cases squarely addressing the point, the two opinions upon which the *La Franca* Court relied (282 U.S., at 574)—*United States v. Gates*, 25 F. Cas. 1263 (S.D.N.Y. 1845) and *United States v. McKee*, 26 F. Cas. 1116 (C.C.E.D. Mo. 1877)—both upheld the proscription against multiple punishment in proceedings brought by action or indictment following previous convictions for the same acts.

Gates held the government could not again impose money penalties upon the defendant regardless of whether the government brought its case "by action" on the civil side of the court or "by indictment" on the criminal side. 25 F. Cas., at 1266: "The facts declared upon as the foundation for the penalty . . . being the same for which the defendant had already been . . . punished . . . the plea [of jeopardy] . . . is good. . . ." *Id.*, at 1267.

The same result obtained in *McKee*. There, Justice Miller sitting on Circuit, held that the Double Jeopardy Clause barred a civil action for aiding and abetting tax fraud after the defendant had pled guilty to conspiracy to defraud in a separate proceeding.

Four years after *McKee*, this Court unanimously stated in *United States v. Chouteau*, 102 U.S. 603, 610-611 (1881) that a second attempt to punish a defendant, by a "civil action" or a "criminal prosecution . . . based upon the same transactions," was barred under the circumstances there presented. Thus, to the extent history is relevant here, it appears to support petitioners, not the government.[7]

III. THE DISTINCTION THE COURT HAS DRAWN BETWEEN REMEDIAL AND PUNITIVE ACTIONS SHOULD NOT BE ALTERED

We argued (Pet. Br., pp. 3-34) that the Court has never sustained as "remedial" a penalty imposed merely to defray the cost of a governmental investigation of third parties.

The government's response is that there is "no basis" for distinguishing between losses to the government's own "financial interests" and the costs incurred when the government has decided to investigate possible "harm done to the public." (Gov. Br., p. 34). This extraordinary contention is contrary to settled principles of law. In addition,

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[7] The relevance of the arcane statutes listed in the government's brief is dubious, at best. 12 U.S.C. §§ 93(b) and 504 were not enacted until 1974 and have no common law heritage.

it would render the "humane interests served by the Double Jeopardy Clause's proscription of multiple punishments" (*Halper*, 490 U.S., at 447) a practical nullity. For both reasons, it should be rejected.

(1) The Court has long emphasized there is a "line" between "remedial actions brought primarily to protect the government from financial loss" and punitive sanctions "intended to . . . vindicate public justice." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 546 (1943). The Court has never varied from the "line" referred to in *Hess*. As recently as *Kurth Ranch*, the Court held a second punishment barred because the "formula by which [the State] computed [the penalty] would have been the same regardless of the amount of the State's damages and, indeed, regardless of whether it suffered any harm at all." 511 U.S. 767, 789-90 (1994).[8]

Nor is this all. *Halper* itself would presumably have been decided in favor of the government if the government had been allowed to include in its calculation of "injury" such abstract, amorphous and infinitely manipulable "criteria" as "the integrity of the [existing] system" (Gov. Br., p. 34) or the government's "programmatic" concern to protect the "public interest." (*Ibid.*). This issue was not discussed in *Halper*. But the Court long ago rejected such an argument in a related context. *See, Republic Steel Corp. v. National Labor Relations Board*, 311 U.S. 7 (1940).

Republic Steel appears to be the only instance in which the Court has directly confronted an administrative order from a government agency directing a private entity "pay to governments what [governments] had paid to employees for services rendered. . . ." *Id.*, at 12. In *Republic Steel*, the employer had violated the National Labor Relations

[8] In a footnote (Gov. Br., p. 34, n.21), it is suggested in passing that petitioners may have caused a loss to the FDIC insurance fund. The government did not seek to employ this theory below, however, and neither the district court nor the court of appeals considered the point.

Act by wrongfully discharging certain of its employees. The discharged employees were, thereafter, employed by various federal, state and local agencies formed to assist the unemployed. The NLRB ordered the employer to rehire the employees with back pay. The Board also ordered payments to the respective government agencies in the amount which the agencies had paid as salaries to the former employees. In striking down the latter part of the order, the Court observed that the payments mandated were based upon the theory of redressing, not an injury to particular persons, "but an injury to the public". So conceived, "these required payments are in the nature of penalties. . . ." *Id.*, at 10. Nor could the government's interest in protecting public programs to aid the employed or in deterring violations of federal labor law change the result. "[I]t is not enough . . . that the [agency's] order . . . would have the effect of detering persons from violating the Act. That argument proves too much. . . ." *Id.*, at 12.

The sole decision of the Court offered by the government as authority for the contention that a concept so amorphous as "impairment of the government's programmatic concern for . . . the public interest" is within the concept of a "loss" (Gov. Br., p. 34) to the government for relevant purposes is *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956). *Rex Trailer*, however, was a case in which the Court held it to be "obvious . . . that injury to the government resulted from [the] fraudulent purchase of trucks [owned by an agency of the government]. 350 U.S., at 153.[9]

[9] The unusual facts of *Rex Trailer* highlight its lack of relevance here. In *Rex Trailer*, the defendant had obtained surplus government property by fraud. The Court construed the statutory remedy invoked by the government as "comparable to" a liquidated damages clause in a contract which obviated proof of specific items of loss, 350 U.S. at 153-54. The Court carefully limited this approach to the facts appearing "on this record." *Ibid.*

(2) In both *Halper* (490 U.S., at 441) and *Kurth Ranch* (511 U.S., at 782) the Court spoke forcefully in describing the preclusion of multiple punishments, "a constitutional protection that has 'deep roots in our history and jurisprudence'." But the government's position, if accepted, would reduce this "deeply-rooted" protection to a mere form of words—*any* punishment can be labeled "remedial" in relation to an abstract aspirational good such as "protect[ing] . . . the public interest." As Judge Easterbrook observed in *Healy*, (96 F.3d, at 911), however, the question is not whether a government program serves a "beneficient purpose" but whether the purpose is achieved by a "*means* [that] is punitive." [10]

(3) The government argues (Br., pp. 32-33) it should be allowed to seek a second punishment of petitioners in a separate proceeding by, in effect, offsetting the money penalties imposed upon petitioners in the amount of "cost of investigation and administration." The contention is unsound. This is so, in addition to the reasons previously discussed, because Congress has not authorized OCC to consider such costs in determining penalty amounts under 12 U.S.C. §§ 93(b) and 504; OCC did not purport to consider such "costs" in assessing the monetary penalties imposed; and allowing such a *post hoc* "computation" of government "costs"—more precisely, of the cost of actually operating part of the government itself—would reduce the protection against multiple punishment to an empty promise.

The Court has never, to the best of our knowledge, permitted an administrative imposition of "investigatory costs" in the absence of a statute explicitly authorizing such an

[10] The repetitive emphasis on "serving" or "promoting" the "public interest" (*e.g.*, Gov. Br., pp. 9, 12, 25, 34) seems most peculiar. It is to be hoped the government believes *all* actions which it initiates meet that standard. This, however, has little connection with the double jeopardy issue presented here.

award when the government has suffered economic injury or a statute which necessarily contemplated recovery of such costs through a double-damage provision, or the like. Indeed, while the Court has sometimes allowed an agency to consider issues of "monetary and other costs" in reaching a decision (*Motor Vehicle Mfg. Assn. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 55 (1983)), the Court has never approved "attributing" such costs to private parties. *Cf.*, *Republic Steel*, 307 U.S., at 12.

Nor has the Court upheld administrative action on a theory which the agency did not even consider. *See, e.g.*, *Motor Vehicle Manufacturers Association*, 463 U.S., at 54 ("an agency's action must be upheld, if at all, on the basis articulated by the agency itself"). The Court has always insisted that it will not accept "*post hoc* rationalizations" by government counsel. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). The same rule should apply in the context of this case.

(4) The license to create *post hoc* justifications which the government seeks—especially when unconstrained by clear statutory criteria—inevitably produces a level of arbitrariness and manipulation that is unacceptable. The Seventh Circuit squarely addressed this point in *Healy*, 96 F.3d at 910-11. The "investigatory-costs-equals-remedial-result" notion, if upheld, would mean, as Judge Easterbrook aptly put it, that the government may free itself "from double jeopardy concerns provided [only that its] investigation is costly enough." 96 F.3d, at 910. Since the government alone decides the amount to expend on a given undertaking, this rationale would inevitably mean that a defendant "could be dogged for eternity by additional penalties for the same misconduct." *Id.*

The present case and *United States v. Walker*, 940 F.2d 422 (9th Cir. 1991) offer examples of the validity of the concerns expressed in *Healy*. In petitioners' case, the government originally took the position that it did not need to justify the penalties previously imposed at all. After the

court of appeals disagreed, the government concocted the artificial "salary and benefits" theory previously discussed.

In *Walker*, however, the "salary and benefits" notion would not have produced the result the government wished to obtain. The defendant in that case had entered the United States without declaring he was in possession of one gram of marijuana. For this offense, he was summarily fined by the Customs Service and, thereafter, indicted. The Customs Service had located the marijuana in a routine airport inspection lasting only a short time and "costing" the government virtually nothing. The government, therefore, simply broadened its concept of "cost": it urged that the defendant's double jeopardy claim be rejected because of the cost of "administering the customs system" itself! 940 F.2d, at 447. A majority of the panel accepted this argument. Dissenting, Judge Noonan demonstrated that allowing the government to "attribute" to a defendant a portion of the cost of operating an entire department or agency of the government renders the protection against multiple punishment a dead letter. *Ibid. Accord, Healy*, 96 F.3d, at 911 ("if . . . only the goal . . . matters then Healy's [previous] criminal fine was not punishment').

The government's position in this Court illustrates the point; the government contends it should be allowed to "allocate" to petitioners portions of the salaries and benefits paid to government employees because "the government's need to retain such employees . . . results from the existence of violators, such as petitioners." (Gov. Br., p. 35, n.22). This is sophistry. Of course, government *ultimately* depends upon population; Antarctica does not have the latter and, therefore, does not need the former. But this Court's double jeopardy jurisprudence has never turned on a shibboleth such as is now offered by the government.

IV. THE ORDER OF PROCEEDINGS DOES NOT MATTER

The government's theory that the constitutional protection against multiple punishment may only be invoked when a civil penalty proceeding follows a criminal trial is flawed. The argument is premised upon a transformation of *Halper* from a case concerned with multiple punishment into a case in which exposure to "punitive civil sanctions" impinged upon a defendant's "interest in [the] finality" of his criminal sentence. (Gov. Br., pp. 37-38). There is not a hint of such a theory in the *Halper* opinion. If the *Halper* Court had intended to decide the question there presented on the extraordinary ground that imposition of a civil penalty compromised the defendant's "legitimate expectation" in the "finality" of a previous criminal judgment, the Court would, doubtless, have so stated. But the Court said nothing of the sort.

The only reason the government offers for its "order of proceeding" contention is that a punitive civil penalty which follows a criminal prosecution may be sought because of a regulator's dissatisfaction with the criminal sentence. (Gov. Br., p. 38). There is no indication such a hypothetical has ever occurred. Moreover, if it ever came about, the defendant would be entitled to a dismissal of the proceeding on due process grounds without regard to double jeopardy issues. *See, Blackledge v. Perry*, 417 U.S. 21 (1974).[11]

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[11] The footnote in *Halper* to which the government refers (490 U.S., at 451, n.10), is inapposite. Both the footnote and the text to which it is appended discuss the distinction between separate proceedings against a defendant and multiple punishments imposed in a single proceeding. There is no indication the Court thought the *order* of separate proceedings was decisive.

V. THE APPROPRIATE "SAME OFFENSE" TEST HAS BEEN MET

This Court's decisions applying double jeopardy principles in the context of civil/criminal proceedings contain a recurring theme: the appropriate inquiry is whether the two proceedings involve "the same transactions". *See, United States v. Chouteau*, 102 U.S. 603, 607, 611 (1881) ("*same subject matter and . . . the same transactions*") (emphasis by the Court); *United States v. La Franca*, 282 U.S. 568, 573 (1931) ("the identical transactions"); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548 (1943) ("the same transactions"); *Cf., Waterloo Distilling Corp. v. United States*, 282 U.S. 577, 580 (1931) (describing *La Franca* as a case in which the government improperly sought two money penalties for the "same transactions."); *Halper*, 490 U.S., at 451 ("same conduct"); *Kurth Ranch*, 511 U.S. 767, 769 ("same conduct").[12]

No decision of this Court has applied the "elements" test of *Blockburger v. United States*, 284 U.S. 299 (1932) in this context. *See, Kansas v. Hendricks*, 117 S.Ct. 2072, 2086 (1997) (*Blockburger* "simply does not apply outside of the successive prosecution context.") This case, however, presents a claim of multiple punishment to which, as noted, the Court has consistently applied a "same transaction" test.[13] The government has offered

[12] The *amicus* appearing in support of respondent suggests that *Halper* be "reconsidered." (Br. of 48 States and Territories, p. 2 and *passim*). This question was not raised below; was not presented by the petition for certiorari; and has not been argued by respondent. The Court has long been committed to the rule that an *amicus* may not raise questions which have not been addressed by the parties. *See, e.g., United Parcel Service v. Mitchell*, 451 U.S. 59, 60, n.2 (1981) and cases there cited. In any event, *Halper* is an important contemporary statement of a long-standing constitutional protection and should remain an authoritative precedent.

[13] The government intimates (Gov. Br., p. 43) that there may be tension between *La Franca* and *Blockburger*. If so, the tension appears to have escaped the attention of the Court. *La Franca*, *Waterloo Distilling* and *Blockburger* were handed down within one year. Each was written by the same author—Justice Sutherland—and each was unanimous.

no sound reason why the Court should abandon the "same conduct or transaction" test which it has applied in this context for well over a century.[14]

CONCLUSION

For the reasons stated herein and previously, the judgment of the court of appeals should be reversed.

Respectfully submitted,

C. MERLE GILE
2200 N. Classen Boulevard
2000 Citizen's Tower
Oklahoma City, OK 73106

JAMES A. ROLFE
2821 Routh Street
Dallas, TX 75201

LYNN PRINGLE
PRINGLE & PRINGLE
4101 N. Classen Boulevard
Oklahoma City, OK 73118

JACK L. NEVILLE, JR.
BERNARD J. ROTHBAUM *
LINN & NEVILLE, P.C.
1200 Bank of
Oklahoma Plaza
201 Robert S. Kerr Avenue
Oklahoma City, OK 73102
(405) 239-6781
Counsel for Petitioners

* Counsel of Record

September 1997

[14] The government suggests (Gov. Br., pp. 40-41 and n.23) that since the court of appeals did not reach the "same offense" issue, the Court may wish to remand for further consideration. If the Court does not accept our submission that the "same transaction" test governs this case, we agree a remand would appear appropriate.

(6)

Supreme Court, U.S.
FILED
JUN 26 1997
CLERK

No. 96-976

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JOHN HUDSON, LARRY BARESEL,
and JACK BUTLER RACKLEY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Daniel J. Popeo
Counsel of Record
David M. Young
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

Date: June 26, 1997

33 pp

QUESTIONS PRESENTED

Are civil monetary sanctions remedial for purposes of the Double Jeopardy Clause when the sanctions are not based upon any harm, damage, or cost to the United States Government and will not compensate the victim of the offense for which the sanctions were imposed?

Is the Double Jeopardy Clause implicated by a civil monetary punishment which precedes a criminal indictment?

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JOHN HUDSON, LARRY BARESEL,
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BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters nationwide.[1] WLF seeks to promote and protect the free

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[1] Pursuant to Supreme Court Rule 37.6, WLF hereby states that no counsel for a party in this case authored this brief in (continued...)

enterprise system and the economic and civil liberties of individuals and businesses. In particular, WLF has devoted substantial resources to protecting the rights of individuals and businesses in administrative proceedings, and curbing excessive government regulation of business through civil and criminal proceedings, by publishing monographs and similar educational materials on these subjects, and by filing *amicus curiae* briefs in appropriate cases. See, e.g., *United States v. McAusland*, 979 F.2d 970 (4th Cir. 1992), *cert. denied*, 507 U.S. 1003 (1993); *Reich v. Arcadian Corp.*, ___ F.3d ___, No. 96-60126 (5th Cir. April 28, 1997). WLF thus brings a broader perspective to the issues in this case than that presented by the parties in this action.

WLF believes that the decision below was a significant departure from the law as stated by this Court in *United States v. Halper*, 490 U.S. 435 (1989), and other cases construing the Double Jeopardy Clause, and the decision below conflicts with that of the United States Court of Appeals for the Seventh Circuit in *S.A. Healy Co. v. Occup. Safety and Health Review Comm.*, 96 F.3d 906 (7th Cir. 1996). If left intact, the Tenth Circuit's decision will allow government agencies to impose successive multiple punishments upon individuals and businesses by nominally labeling the proceedings as civil, and by using after-the-fact justifications to characterize a sanction as remedial even though it was intended to punish the defendant. Such a rule would destroy a defendant's constitutionally protected expectation of finality in a punishment, allow the Government to bring multiple actions to punish defendants merely because the Government is dissatisfied with the sentence first rendered, and entangle

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[1](...continued)
whole or in part.

defendants in multiple costly trials. These increased costs to businesses will ultimately be borne by consumers, workers, and society as a whole.

WLF is filing this brief with the consent of Petitioners and Respondent. WLF has lodged consent letters with the Clerk of the Court.

STATEMENT OF THE CASE

The Petitioners, John Hudson ("Hudson"), Larry Baresel ("Baresel"), and Jack Butler Rackley ("Rackley"), were officers or directors of one or more of several banks acquired by petitioner Hudson. During 1986 and 1987, the United States Department of Treasury, through its Office of the Comptroller of the Currency ("OCC"), issued Reports of Examination ("ROA's") alleging that Petitioners violated federal statutory prohibitions on "insider" or "nominee" lending.

As a result, in 1989, OCC initiated two adversary proceedings against Petitioners. First, OCC sought to impose "assessments" of $100,000 against petitioner Hudson and $50,000 each against Petitioners Baresel and Rackley, pursuant to 12 U.S.C. §§ 93(b) and 504. Second, OCC sought to prohibit Petitioners from participating in the affairs of federal insured financial institutions, pursuant to 12 U.S.C. § 1818(e) and (i). OCC's "notice of assessment of a civil money penalty" stated that the money penalties were imposed pursuant to 12 U.S.C. §§ 93(b) and 504 for violations of 12 U.S.C. §§ 84 and 375(b), and, that the amount of the penalties was determined based upon, *inter alia*, "the gravity of the violations [asserted against petitioners and] the history of previous violations . . . " App. at 89a.

The monetary sanctions were therefore based upon the asserted magnitude and egregiousness of the Petitioners' violations and the amount of damage caused to the banking institutions involved. OCC did not assert any loss or damage to the Government as the basis for the sanctions. Petitioners entered into a consent decree with the Government providing for reduced fines of $44,000, but the reduced amount again was not based upon any cost or injury to the Government.

In 1992, the United States Government indicted Petitioners for the same conduct for which it had previously imposed monetary sanctions. Petitioners moved to dismiss the indictment on the grounds that it was barred by the Double Jeopardy Clause of the Fifth Amendment. The district court denied the motion by unpublished order, and Petitioners timely appealed.

The United States Court of Appeals for the Tenth Circuit affirmed the district court's determination that the non-participation sanctions were not punishment within the meaning of the Double Jeopardy Clause, but held that the monetary sanctions appeared, *prima facie*, "to be designed, at least in part, to punish and deter improper conduct." App. at 80a. The court of appeals remanded to the district court to "determine the precise injury caused to the government for which the sanctions are the remedy . . . . " *id.*, and instructed the district court to dismiss the indictment unless the sanctions were solely remedial. *Id.* (*citing Halper*, 490 U.S. at 452).

On remand, the district court conducted an evidentiary hearing concerning the nature of the fines and the Government's costs and damages. The district court found, based upon the Government's evidence, that the fines were

imposed to provide general and specific deterrence, and were based upon a penalty matrix which considered the willfulness, number and duration of violations, concealment of violations, and the existence of prior violations by Petitioners. App. at 13a-14a. The district court further found that the costs to the Government of investigation and prosecution were not considered in setting the sanctions, and that the Government was not a victim of Petitioners' conduct. *Id.*

The Government did not put on any evidence to demonstrate that it considered, or could have considered under its statutory authority, its costs and damages in setting the penalty, but it alleged that it had incurred $72,000 in "investigative costs." This contention was based upon an *ex post* estimate prepared by attributing a portion of OCC employee salaries to time spent in the investigation of Petitioners. The district court dismissed the indictment because the sanctions were based entirely upon punitive concerns and did not provide a remedy for the Government. App. at 14a.

The Government then appealed to the Tenth Circuit, and a differently constituted panel reversed the district court's dismissal of the indictment. App. at 8a. The court of appeals, ostensibly relying on *Halper's* gross disproportionality requirement, held that the total fines eventually imposed of $44,000 were not disproportionate to the "proven damages" to the Government of $72,000. *Id.* Petitioners timely petitioned for a writ of certiorari, which this Court granted on April 14, 1997.

SUMMARY OF ARGUMENT

The Tenth Circuit's decision in *Hudson II* would improperly permit the United States Government to punish the Petitioners twice for the same conduct. The lower court reached this result by allowing Respondent to rationalize the first punishment on a basis which was demonstrably fictitious, specifically, that the civil monetary sanctions at issue were not intended to punish the defendants but were merely to provide a remedy to the Government. This rationale was a fiction because Respondent conceded it was not a victim of the Petitioners' conduct, and the civil monetary fines were not and could not have been based upon Respondent's damages or costs. To the contrary, the sanctions were not based upon its costs of detection or investigation, and evidence of Respondent's costs was introduced merely as an after-the-fact rationalization of the penalty. This ruling was contrary to the law as stated by this Court in *Halper*, conflicts with the Seventh Circuit's decision in *Healy*, and represents a significant expansion of the Government's ability to punish defendants in successive proceedings by nominally labeling the proceedings as "civil" and justifying the penalties imposed with fictitious after-the-fact rationales.

This Court has recognized that civil penalties which constitute punishment implicate the Double Jeopardy Clause. *Halper*, 492 U.S. at 448-49. A nominally civil penalty may constitute punishment under the Double Jeopardy Clause when the purpose and effect of the statute is to impose punishment, *e.g.*, *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994), or, when the penalty imposed is so grossly disproportionate to the damages incurred that the sanction constitutes punishment. *Halper*, 492 U.S. at 452. The Double Jeopardy Clause therefore prohibits the successive use

of civil punishments as defined by reference to either the intended effect of the statutory scheme or the actual punishment imposed.

This limitation on the Government's ability to impose multiple punishments is supported by sound policy considerations. Under Respondent's view of the Double Jeopardy Clause, government agencies can bring repeated actions against a defendant based on the same conduct, as long as the proceedings are nominally civil, until the Government is satisfied with the penalties imposed or the penalties become grossly disproportionate to the Government's damages. Such an approach would destroy the defendant's expectation of finality in a punishment, and impose untold costs upon persons and businesses facing the threat of successive civil actions by government. Moreover, Respondent's argument would set a dangerous precedent by allowing the Government to justify its actions with fictitious after-the-fact rationales for the actions it had taken.

Because of the increased availability to federal and state governments of parallel civil and criminal sanctions for the same conduct, and the dramatic increase in parallel proceedings brought by government regulatory agencies, the Court's decision will have a significant impact on the conduct of the Government in enforcing laws backed by civil and criminal penalties. The Tenth Circuit's decision would effectively eliminate any double jeopardy protection for regulated persons and industries as long as the Government denominates its proceedings as civil. For these reasons and the reasons set forth below, the Washington Legal Foundation ("WLF") respectfully urges this Court to reverse the decision below.

ARGUMENT

I. THE DOUBLE JEOPARDY CLAUSE PROHIBITS MULTIPLE PUNISHMENTS, INCLUDING CIVIL SANCTIONS WHICH ARE NOT BASED UPON THE COSTS OR INJURY OF A DEFENDANT'S CONDUCT TO THE GOVERNMENT.

The Double Jeopardy Clause prohibits multiple punishments imposed in separate proceedings for the same offense. *Kurth Ranch*, 114 S.Ct. at 1941 n.1; *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). In this case, the United States Government has commenced separate civil and criminal proceedings against Petitioners. The second proceeding is criminal, and there is no dispute that it implicates the Double Jeopardy Clause; the dispute in this case concerns whether the first proceeding was undertaken to punish the Petitioners; if it was, then the criminal indictment constitutes a second jeopardy and is barred by the Double Jeopardy Clause.

The prior decisions of this Court firmly establish that the label of a civil or administrative proceeding as such does not determine whether the action was intended to punish a defendant. *See, e.g., Kurth Ranch*, 114 S.Ct. at 1945 ("[a] defendant convicted and punished for an offense may not have a nonremedial civil penalty imposed against him for the same offense in a separate proceeding."); *Halper*, 490 U.S. at 447. Instead, this Court has directed the lower courts to consider both whether the statute involved was intended to provide a civil or criminal sanction, whether the purpose or effect of the statute was to punish the defendant, and whether the sanction actually imposed was so disproportionate to the Government's damages as to render it punitive

notwithstanding the remedial intent of the statute. If the sanction fails any of these criteria, then the sanction constitutes a punishment and implicates the Double Jeopardy Clause.

A. A Civil Sanction Cannot Be Deemed Remedial When It Is Based Upon A Statutory Penalty Scheme Which Does Not Provide Compensation to the Victim or Take Into Account The Government's Damages and Investigative Costs.

The statute under which Petitioners were sanctioned was intended to punish those who violate its provisions. The penalty provisions of the statute make no provision for consideration of any harm, damage or cost to the Government; instead, the penalties are based upon the size of the business of the violator, the violator's good faith, the gravity of the harm caused, and the violator's history of prior violations. 12 U.S.C. § 93(b). The statute further allows consideration of "such other matters as justice may require", but makes no provision for the Government's harm or damages, or for the costs of investigation and prosecution.[2] Penalties imposed under the statute are *in personam* civil penalties.

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[2] During the evidentiary hearing which the district court conducted after the remand from *Hudson I*, Respondent put on its evidence of its costs of investigation, detection and prosecution. Respondent's witness, Daniel Stipano, an attorney and Director of the Enforcement and Compliance Division of OCC, conceded that the Government had no legal authority under the statute to demand restitution in setting the penalty. App. at 27a-28a, 33a.

In *Halper*, this Court addressed whether civil *in personam* penalties imposed under the False Claims Act constituted a punishment and thereby violated the Double Jeopardy Clause. The False Claims Act specifically provided for consideration of the Government's costs of investigation and prosecution in setting the fine. *Halper*, 492 U.S. at 438. Despite the fact that the United States was the victim of Halper's violations, and the statute allowed consideration of the Government's loss in setting the fine, this Court held that the fines imposed violated the Double Jeopardy Clause because they were grossly disproportionate to the Government's damages. *Halper*, 492 U.S. at 452.

The penalties imposed in this case differ from those in *Halper*, but in a manner which makes them even more clearly violative of the Double Jeopardy Clause. First, the Government was not a victim of Petitioners' conduct, and therefore the penalties imposed cannot be justified as a remedy for the Government. Second, unlike the False Claims Act at issue in *Halper*, the statute under which Petitioners' were penalized makes no provision for the Government's costs of investigation or prosecution, and is therefore not intended to make the Government whole. To the contrary, the penalties are based upon the defendant's size, the gravity of the violations, the history of the violations, and the defendant's good faith.[3] 12 U.S.C. § 93(b).

The fact that the costs of prosecution and investigation may have, by coincidence, and when viewed after the fact,

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[3] As Petitioners point out, the penalty matrix is indistinguishable from the sentencing matrix used in the Sentencing Guidelines for federal criminal defendants. *See Nichols v. United States*, 511 U.S. 738 n.3 (1994).

exceeded the penalties imposed, cannot justify the penalties as remedial. The Double Jeopardy Clause is intended to protect a defendant's interest in the finality of a sentence and to avoid the expense, embarrassment, and anxiety of successive trials. *Morris v. Mathews*, 475 U.S. 236, 247 (1986); *United States v. DiFrancesco*, 449 U.S. 117, 127 (1980). The civil proceeding against Petitioners constituted a jeopardy when it occurred because, under the statute, the proceeding was -- indeed, had to have been -- intended to punish the Petitioners, not to provide Respondent a remedy. That Respondent explains after-the-fact that the penalties did not exceed its costs cannot undo the jeopardy which had already attached. *Cf. Kurth Ranch*, 114 S.Ct. at 1948 (state's initiation of proceeding to collect tax on possession of drugs was "functional equivalent of a successive criminal prosecution that placed . . . [the defendants] in jeopardy a second time 'for the same offense'.").

Moreover, although recovery of the costs of investigation and prosecution might be considered compensatory in the sense that it assists Respondent in breaking even, the penalties cannot be remedial because Respondent was not the injured party and the penalties produced no benefit to the victims of Petitioners' conduct. *Healy*, 96 F.3d at 910. Instead, the penalties provided specific and general deterrence, the standard objectives of the criminal law.

Respondent contends that *Halper* is both the beginning and the end of this Court's limitation on civil monetary penalties under the Double Jeopardy Clause.[4] According to Respondent, *Halper* and subsequent forfeiture cases of this

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[4] *See* Respondent's Brief in Support of Petition for Writ of Certiorari at 9-12.

Court stand for the proposition that only those civil penalties which are in fact grossly disproportionate to the Government's costs and damages constitute double jeopardy punishment. Because the sanctions on Petitioners were not in fact grossly disproportionate to Respondent's claimed costs, Respondent contends that is enough to pass double jeopardy muster.

However, a review of this Court's decisions demonstrates that gross disproportionality is not the sole double jeopardy limitation on civil punishment; instead, *Halper* is an additional limitation which addresses the rare case in which the penalty is grossly disproportionate to the Government's costs and damages, even though the fine was intended to be based upon the harm and cost to the Government. Where, as in this case, the penalty was not and could not have been based upon the harm or cost to Respondent, the penalty constitutes punishment regardless of whether it is grossly disproportionate to the Government's alleged costs.

Even prior to *Halper*, this Court had consistently recognized that civil proceedings may violate constitutional protections generally afforded only to criminal defendants. For example, in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), this Court considered whether revocation of citizenship as a sanction for draft avoidance constituted punishment for purposes of implicating a defendant's right to counsel and other constitutional protections.[5] The Court found that the statute was intended to punish violators, and therefore defendants were entitled to constitutional protections such as the right to counsel. Following *Kennedy*,

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[5] The Double Jeopardy Clause was not at issue in *Kennedy*. 372 U.S. at 165-68.

the Court employed a two-level inquiry in *United States v. Ward*, 448 U.S. 242 (1980), to determine whether a statutory penalty imposed under the Clean Water Act was civil or criminal for purposes of the Fifth Amendment's guarantee against compulsory self-incrimination. The Court did not limit its review to disproportionality, but rather asked whether: 1) Congress expressly or impliedly indicated a preference for the characterization as civil or criminal; and 2) if Congress intended to establish a civil penalty, "whether the statutory scheme [is] so punitive either in purpose or effect as to negate that intention." *Id.* at 248-49.

This Court then applied and refined the *Kennedy-Ward* analysis in the context of a forfeiture proceeding in *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984). Chief Justice Burger, writing for a unanimous Court, considered whether the forfeiture proceeding was "intended to be, *or by its nature necessarily is*, criminal and punitive, or civil and remedial (emphasis added)." *Id.* at 362. Noting that resolution of that question begins as a matter of statutory construction, the Court applied the *Ward* analysis to 1) "'determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other'"; and 2) "'whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.'" *Id.* at 362-63 (*quoting Ward*, 448 U.S. at 248). The Court also stated that the considerations set forth in *Kennedy* were "helpful" in this analysis. *89 Firearms*, 465 U.S. at 365.[6] Applying the *Ward* analysis to

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[6] The *Kennedy* factors are:

Whether the sanction involves an affirmative disability

(continued...)

the forfeiture at issue, the Court held that the forfeiture did not constitute punishment.

Viewed in the light of this background, it becomes clear that this Court's 1989 decision in *Halper* did not dispense with, but rather added to the double jeopardy protection the Court had previously recognized for nominally civil sanctions. In *Halper*, it was undisputed that the statute at issue, the civil False Claims Act, was intended to provide a civil sanction as a remedy. The False Claims Act specifically authorized damages to compensate the Government for its costs and injury,[7] and in that case the Government was the victim of Halper's fraud. The issue presented in *Halper* was whether the punishment exacted, potentially over $130,000 for a $585 fraud, constituted double jeopardy punishment even though the statute was intended to provide remedial

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[6](...continued)
or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . .

Kennedy, 372 U.S. at 168-69 (footnotes omitted).

[7] *See* 31 U.S.C. § 3729 (following the 1986 amendments, the statute provided for liability of $2,000 per violation, an amount equal to two times the amount of damages the Government sustained because of the violator's acts, and the costs of the civil action).

relief. This Court held that the penalty constituted punishment because it was "grossly disproportionate" to the harm to the Government. *Halper*, 495 U.S. at 452. The Court thereby recognized an additional level of double jeopardy protection for defendants in nominally civil proceedings, *viz.*, whereas under *Kennedy*, *Ward*, and *89 Firearms*, the statute must be intended as remedial and be remedial in purpose and effect, under *Halper* the penalty must also be not grossly disproportionate to the harm, even if the test of *Kennedy*, *Ward* and *89 Firearms* is met.

This Court's analysis in two post-*Halper* cases, *Kurth Ranch*, 114 S.Ct. at 1948, and *United States v. Ursery*, ___ U.S. ___, 116 S.Ct. 2135 (1996), further demonstrates that a civil monetary sanction must be remedial both by reference to the statutory intent, purpose and effect of the sanction, and to its proportionality. In *Kurth Ranch*, the Court held that a tax assessment based on Montana's Dangerous Drug Tax Act constituted punishment for purposes of the Double Jeopardy Clause. The Court acknowledged that it was inappropriate to apply *Halper*'s analysis to a state drug tax, *Kurth Ranch*, 114 S.Ct. at 1948, but the Court nonetheless held that the tax imposed a double jeopardy punishment because as a matter of statutory construction, the intent, purpose and effect of the statute was to impose punishment. *Kurth Ranch*, 114 S.Ct. at 1945-49.[8]

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[8] As noted *infra* at 17, the Court so held without discussing or even citing its prior decisions in *Kennedy* and *Ward*, thereby demonstrating that although *Kennedy* and *Ward* were not strictly applicable, a civil sanction could constitute punishment even without gross disproportionality.

The Court's analysis in *Kurth Ranch* bears on this case in two important ways. First, in construing the statute, the Court reiterated what it had previously stated in *Halper*, that the statutory label as criminal or civil was not of paramount importance. *Id.* at 1945. Second, the Court determined whether the tax statute imposed punishment not simply by reference to whether the actual tax imposed was in fact grossly disproportionate, but rather by considering the purpose and effect of the statute. Emphasizing that the tax statute imposed liability for criminal conduct, and was assessed upon goods which the taxpayer did not lawfully possess, the Court held that the tax constituted a punishment. *Id.* at 1947-48.[9]

In *Ursery*, the Court distinguished both the *Halper* gross disproportionality analysis and the *Kennedy-Ward-Kurth Ranch* statutory purpose and effect analysis as applied to *in personam* sanctions to hold that civil *in rem* forfeitures were not punishment for double jeopardy purposes. *Ursery*, 116 S.Ct. at 2149. The Court emphasized the unique nature of civil *in rem* forfeitures, and observed that Congress had authorized parallel forfeitures and criminal prosecutions since the earliest years of the Nation with the Court's approval. *Id.* at 2140. Further, the Court expressly distinguished *Halper* and *Kurth Ranch* as cases involving *in personam* civil penalties, which presented a "sharp distinction" from *in rem* civil forfeitures. *Id.* at 2141, 2143-44.

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[9] Of further import for this case, as discussed *infra*, the Court rejected the possibility that the tax could be justified as remedial, stating: " . . . the formula by which Montana computed the tax assessment would have been the same regardless of the amount of the State's damages and, indeed, regardless of whether it suffered any harm at all." *Id.* at 1948.

To summarize, this Court's double jeopardy jurisprudence establishes several principles which demonstrate that the decision below was incorrect. First, double jeopardy analysis of civil sanctions is not limited to gross disproportionality. Second, in addition to the disproportionality limitation, the Court must also consider the intent, purpose and effect of the statute upon which the sanctions were based. Third, in making this analysis, the label as civil or criminal is not of paramount importance. Fourth, the Court must consider the statutory scheme and examine the circumstances in which the sanction may be imposed and the factors upon which the sanction may be based. Moreover, none of this Court's decisions hold that a sanction intended as punishment may be justified after the fact by demonstrating that the sanction imposed was coincidentally proportionate to the Government's costs.

Under the Court's decisions, it is not clear whether the analytical framework for this case is found in *Halper*, or the *Kennedy*, *Ward*, and *89 Firearms* cases, or somewhere else. *Compare, e.g.*, *Halper*, 490 U.S. at 447 (*Ward* approach "not well suited to the context of the 'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments."); *Austin v. United States*, 509 U.S. 602 n.6 (1993) (stating that *Halper* is now the point of reference for determining punishment, and not *Kennedy* and *Ward*); *Kurth Ranch*, 114 S.Ct. at 1948 (distinguishing *Halper* as inapplicable to a tax case but finding that tax constituted punishment without discussing or citing *Kennedy* and *Ward*); *Ursery*, 116 S. Ct. at 2145, 2147 (distinguishing *Halper* and applying *89 Firearms* as "useful analytical tool" to find forfeiture did not constitute punishment). Regardless of which framework the Court looks to, the answer in this

case is the same: the sanctions imposed in this case constituted punishment.

The proper application of the double jeopardy analysis leads to the conclusion reached by the *Healy* court, that the monetary sanctions imposed upon Petitioners were punishment for their offenses. The sanctions were punishment because they were based upon, and could only have been based upon, factors which were unrelated to remedial concerns such as Respondent's damages and costs of detection, investigation and prosecution. *See Ursery*, 116 S.Ct. at 2157 (Stevens, J., dissenting) ("[t]here is no need to determine whether a statute that is punitive by design has a punitive effect when applied in the individual case."). The sanctions were based upon factors relating to the egregiousness of Petitioners' conduct, and their ability to pay, which are matters of specific and general deterrence. *Halper*, 490 U.S. at 448 ("[r]etribution and deterrence are not legitimate nonpunitive governmental objectives." (citation omitted)).

B. The Double Jeopardy Clause Violation Does Not Depend Upon Whether The Government Imposed Civil Punishment Before Or After It Sought to Impose Criminal Punishment.

The successive actions against Petitioners in this case cannot be justified on the basis that the civil action was concluded first, in contrast to *Halper* in which the criminal action was concluded first. The pertinent question is whether the penalty imposed was punishment, and there is no principled basis for the answer to that question to depend on whether it was imposed in the first or second proceeding. *Ursery*, 116 S.Ct. at 2161 (Stevens, J., concurring in the

judgment in part and dissenting in part) ("[t]he prohibition against two such proceedings cannot depend on the order in which they are filed."); *Kurth Ranch*, 114 S.Ct. at 1957 (Scalia, J., dissenting) (" . . . if there is a constitutional prohibition on multiple punishments, the order of punishment cannot possibly make any difference.").

Although this Court has not squarely addressed that question, lower federal courts have generally agreed that the order of the proceedings cannot matter. *See, e.g., United States v. Tilley*, 18 F.3d 295 n.5 (5th Cir. 1994) ("[r]egardless of the order of the civil and criminal proceedings, the Double Jeopardy Clause will bar the second sanction if both the first and second sanctions are deemed punishment"); *United States v. Furlett*, 974 F.2d 839 n.2 (7th Cir. 1992) ("no reason for holding that *Halper* should apply only to civil proceedings that post-date criminal ones"); *United States v. Walker*, 940 F.2d 442, 443 n.2 (9th Cir. 1991) (same); *United States v. Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990) (fact that civil penalties were imposed before criminal trial irrelevant for double jeopardy analysis); *United States v. Mayers*, 897 F.2d 1126, 1127 (11th Cir.) (per curiam) (*Halper* principle applies whether civil penalty or criminal punishment comes first), *cert. denied*, 498 U.S. 865 (1990).

C. The Civil Sanction Cannot Be Justified As Remedial On The Basis Of The Government's Subsequent, Fictitious, And Wholly Coincidental Rationale.

This Court should not countenance Respondent's fictitious *ex post* rationale that the sanctions imposed were remedial because they approximated or were less than the Respondent's costs. Respondent concedes that it was not the victim of the Petitioners' conduct, and that it did not and could not consider its costs of investigation and prosecution when imposing or reducing the sanctions. Therefore, Respondent's costs were unrelated to the sanctions imposed, and whatever approximation the sanctions had to Respondent's costs was purely coincidental.

In *Kurth Ranch*, the Court rejected a similar contention, stating, " . . . in any event, the formula by which Montana computed the tax assessment would have been the same regardless of the amount of the State's damages and, indeed, regardless of whether it suffered any harm at all." *Kurth Ranch*, 114 S.Ct. at 1948. Thus, the Court rejected the argument that the coincidental approximation of the Government's costs to the tax imposed could classify the tax as remedial, and the Court held that the tax constituted a punishment within the meaning of the Double Jeopardy Clause.

Similarly, in *Austin*, the Court held that a forfeiture was subject to the Eighth Amendment's Excessive Fines Clause, and in so holding the Court rejected the Government's argument that the forfeitures served as a reasonable form of liquidated damages. *Austin*, 113 S.Ct. at 2811. Citing *Ward*, the Court stated, "the 'forfeiture of property . . . [is] a penalty that ha[s] absolutely no correlation to any damages sustained

by society or to the cost of enforcing the law.'" *Austin*, 113 S.Ct. at 2812. Thus, the Court has rejected the Government's attempts to classify as remedial those punishments which approximate the Government's damages and costs only through coincidence. Moreover, such a rationalization is inconsistent with this Court's decisions in *Kennedy*, *Ward*, and *89 Firearms*, each of which analyzed the statutory purpose in order to determine whether the statute imposed a punishment.

II. THE DOUBLE JEOPARDY PROTECTION RECOGNIZED BY THE SEVENTH CIRCUIT'S DECISION IN *HEALY* IS NECESSARY GIVEN THE INCREASED AVAILABILITY AND USE OF PARALLEL CIVIL AND CRIMINAL PENALTIES AGAINST REGULATED PERSONS AND INDUSTRIES.

A. The *Healy* Decision Properly Addresses The Reality That Government Might Punish Defendants Through Ostensibly Civil Proceedings.

The result as set forth in *Healy* is necessary to prevent the Government from bringing successive punitive actions because it is dissatisfied with the results from the first action, and to protect defendants from suffering the time, expense, frustration, and threat of successive punitive actions. Respondent's argument, if adopted, would have serious and detrimental consequences for all persons and industries regulated by laws providing both civil and criminal penalties. As the *Healy* Court stated:

> If the Secretary's understanding is correct, then there is not much left of the double

> jeopardy clause. Additional federal agencies furthering their own agendas may conduct their own investigations. The multiplying costs of the investigations become the justification for still more proceedings and the imposition of additional fines. . . . [the defendant] could be dogged for eternity by additional penalties for the same misconduct. This the double jeopardy clause does not allow.

Healy, 96 F.3d at 910.

Further, Respondent's argument, if adopted, would allow it to first initiate civil actions which have the threat of criminal penalties (*i.e.*, penalties in excess of and unrelated to the Government's harm), but which lack the protections provided to defendants in criminal actions. Then, if the Government is dissatisfied with the result of the civil action, it could justify the penalties as merely remedial and initiate a criminal prosecution, or, as the *Healy* Court noted, initiate successive civil actions until it is satisfied with the quantum of damages. *Halper*, 490 U.S. at 451 n. 10 ("On the other hand, when the Government already has imposed a criminal penalty and seeks to impose additional punishment in a second proceeding, the Double Jeopardy Clause protects against the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding.").

In contrast, the analysis WLF proposes would not impair the Government's ability to fully regulate business conduct and prosecute crimes. The Government would merely be precluded from attempting to obtain penalties unrelated to its

costs and damages in two separate proceedings. *See, e.g., Healy*, 96 F.3d at 911 ("Imposed in a single proceeding, the criminal and administrative fines would not have been problematic, for the double jeopardy clause allows multiple punishments if there is only one 'jeopardy'" (citation omitted)). Further, the Government could still initiate successive proceedings to obtain remedial relief. For example, the Government could obtain suspension of a drunk driver's driving license in order to keep the driver off the streets and then bring a subsequent criminal prosecution. *See, e.g., Ursery*, 116 S.Ct. at 2161 n. 16 (Stevens, J., dissenting); *Healy*, 96 F.3d at 911. The rule of *Healy* also does not preclude an injured party from bringing a private civil action in its own right to obtain compensation from the violator.

State and federal regulatory schemes now commonly provide both civil and criminal sanctions for violators, affording government agencies multiple bites at the punishment apple.[10] Moreover, those sanctions, even if entitled "civil", are of increasing severity. *See* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325-27, 1333-34 (1991) (describing current trend of using civil remedies to complement criminal law enforcement); Peter J. Henning, *Precedents in a Vacuum: The Supreme Court*

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[10] For example, numerous federal statutes and administrative regulations permit both civil and criminal proceedings, including: the Sherman Act, 15 U.S.C. §§ 1-3, 15, 15(a) (antitrust); the Internal Revenue Code, 26 U.S.C. § 7201; the Securities Act of 1933, 15 U.S.C. § 77t; and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68.

Continues to Tinker With Double Jeopardy, 31 AM.CRIM.L.REV. 1, 4-5, 34,35 (1993) (describing overlapping penalties); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1796-98, 1800-01, 1844, 1849-54 (1992) (describing increased role of punitive civil sanctions in law enforcement and noting that such sanctions are often more severely punitive than the parallel criminal sanctions for the same conduct).

The increased availability, use, and severity of such "civil" sanctions merits this Court's close attention to the practical implications of this case. The Government should not be permitted to seek what is essentially criminal punishment through civil proceedings which deny defendants their constitutional rights. *See* Mann, *supra*, at 1798, 1801, 1849 (noting that punitive civil sanctions have become cheaper and more efficient for Government than criminal sanctions because they are not constrained by criminal procedure); *cf. Smith v. Dep't of Human Servs.*, 876 F.2d 832, 836 (10th Cir. 1989) (purpose of liquidated damages provision in Age Discrimination in Employment Act was to avoid procedural difficulties that would come with a criminal penalty). Our legislatures may permit the Government to regulate the affairs of persons and industries with the threat of punishment, but the Double Jeopardy Clause does not permit the Government to seek multiple successive punishments for the same offense regardless whether the punishments are imposed through either civil or criminal proceedings.

B. The Rule Of *Healy* Does Not Require The Lower Courts To Make An Inappropriate Inquiry Into The Subjective Motivations Behind A Government Prosecution.

Contrary to Respondent's argument, the analysis WLF proposes as set forth in *Healy* would not improperly lead the lower courts into a subjective inquiry of the motives lying behind a civil action. Respondent contends that Petitioners' argument, and the *Healy* court's decision, improperly requires a subjective inquiry into the purpose of a civil action.[11] However, the *Healy* analysis requires only a straightforward construction of the relevant statute and the agency's implementing policies. To that extent, the inquiry is no more subjective than is any court's construction of a statute or an agency policy.

Nothing in *Healy* requires the lower courts to determine the actual motivations of individual agency officials in bringing an action. Instead, *Healy* stands for the common sense proposition that where, as here, the terms of the statute and the agency's policies demonstrate that the Government's costs are not considered in imposing a penalty, that penalty cannot be justified by its coincidental relationship to the Government's costs. *Healy*, 96 F.3d at 910-12.

To the extent the *Healy* analysis requires lower courts to consider the intent of Congress and the purpose of the legislative scheme, that inquiry accords with this Court's double jeopardy jurisprudence. *Ursery*, 116 S.Ct. at 2147-48, n.3 (first step of *89 Firearms* analyis is whether Congress

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[11] *See* Respondent's Brief in Support of Petition for Certiorari at 7-8.

intended proceeding to be civil or criminal; second step is whether proceeding is punitive in purpose or effect); *Kurth Ranch*, 114 S.Ct. at 1947-48 (tax was "motivated" by a "penal and prohibitory intent" and thus was functional equivalent of a successive criminal prosecution); *89 Firearms*, 465 U.S. at 362 ("Unless the forfeiture sanction was *intended* as punishment, so that the proceeding is essentially criminal in character, the Double Jeopardy Clause is not applicable. The question, then, is whether a . . . forfeiture proceeding is *intended to be, or by its nature necessarily is*, criminal and punitive, or civil and remedial" (emphasis added) (citations omitted).

CONCLUSION

For the foregoing reasons, WLF respectfully requests that this Court reverse the decision of the Tenth Circuit.

Respectfully submitted,

Daniel J. Popeo
Counsel of Record
David M. Young
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

Supreme Court, U.S.
FILED
JUN 26 1997
CLERK

(7)

No. 96-976

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOHN HUDSON, LARRY BARESEL, AND
JACK BUTLER RACKLEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

LISA KEMLER
National Association of
Criminal Defense Lawyers
108 North Alfred Street
P.O. Box 20900
Alexandria, VA 22313

ARTHUR F. MATHEWS
Counsel of Record
JANE L. MCCLELLAN
JAY V. PRABHU
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000
Counsel for Amicus Curiae
National Association of
Criminal Defense Lawyers

June 26, 1997

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No. 96-976

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOHN HUDSON, LARRY BARESEL, AND
JACK BUTLER RACKLEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

This *amicus curiae* brief is submitted in support of the Petitioners, John Hudson, Larry Baresel, and Jack Butler Rackley. By letters filed with the Clerk of the Court, Petitioners and Respondent have consented to the filing of this brief.[1/]

[1/] As required by Rule 37.6 of this Court, *amicus curiae* submits the following: no party other than counsel authored this brief in whole or in part; no person or entity, other than *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 9,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives is to ensure the proper administration of justice and to ensure that criminal statutes are construed and applied in accordance with due process.

The NACDL files this *amicus curiae* brief to urge the Court to find that civil sanctions that are not remedial constitute punishment for double jeopardy purposes. Any civil proceeding brought by the government involving imposition of civil monetary penalties as a sanction that does not involve injury to the government itself should be considered presumptively punitive. The government in such situations must demonstrate that the sanctions it is seeking are consistent with remedying the defendant's unlawful actions and are not sought for the purposes of retribution or deterrence.

Congress has adopted a wide array of civil statutes that impose large civil monetary fines and penalties on parties found to have violated civil statutes; the legislature has also created criminal actions that allow punishment of the same

conduct. When the purposes of the civil and criminal proceedings are the same, *i.e.*, punitive, the government violates the Double Jeopardy Clause when it brings two successive actions.[2/]

SUMMARY OF ARGUMENT

Petitioners were officers or directors of several small banks in Oklahoma and were subjected to civil and administrative penalties based on their violations of federal banking statutes prohibiting insider or nominee lending transactions. Petitioners were later indicted on criminal charges arising from the same alleged insider lending transactions.

The question raised by Petitioners is whether imposition of civil monetary fines by federal regulatory authorities in addition to other administrative sanctions, in particular non-participation or debarment sanctions, constitutes punishment for purposes of the Double Jeopardy Clause of the Fifth Amendment. Civil fines are punitive rather than remedial when calculation of the fines or monetary penalties is not tied specifically to an assessment of the investigative costs or harm suffered by the government. Here, the fines involved were patently punitive in nature. This fact is further supported by the imposition of additional non-participation or debarment sanctions against Petitioners. The revocation of the ability of Petitioners to participate in the banking industry

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[2/] The NACDL does not dispute that the government may seek reimbursement of its actual investigatory costs, disgorgement of illicit profits, *in rem* civil forfeiture, or restitution to injured third parties in appropriate proceedings parallel to a criminal prosecution for the same violative conduct.

is sufficient to protect the integrity of the banking system and the interests of depositors, and thus accomplishes the government's remedial goals. Additional monetary penalties (in the absence of any proof of injury or actual costs to the government) only serve to deter others from similar activities and to punish the Petitioners.

This case is yet another example of a federal agency attempting to blur the distinction between civil and criminal proceedings in order to impose multiple punishments upon defendants and dilute their double jeopardy rights. In *United States v. Halper*, 490 U.S. 435 (1989), this Court proscribed the subsequent use of civil proceedings to punish defendants further when they had already been punished in a prior criminal proceeding. In this case, the inverse situation has occurred with the same potential substantive result. This Court should effectuate the principles of the Double Jeopardy Clause by overturning the lower court's ruling as inconsistent with the reasoning in *Halper*.

ARGUMENT

I. CRIMINAL PROSECUTION AFTER IMPOSITION OF PUNITIVE CIVIL OR ADMINISTRATIVE SANCTIONS VIOLATES THE DOUBLE JEOPARDY CLAUSE

A. Non-Remedial Civil Monetary Fines are "Punishment" for Double Jeopardy Purposes

The Double Jeopardy Clause prohibits the government from seeking civil punitive sanctions against a defendant and thereafter criminally prosecuting the defendant for the same

conduct in a separate proceeding.[3] In *United States v. Halper*, this Court held "that the Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole." 490 U.S. 435, 451 (1989). Although the order of the civil and criminal proceedings in the instant case is the reverse of *Halper*, *Halper*'s holding controls the facts of this case. When a civil sanction is punitive, the order of the criminal and civil proceedings seeking to punish the defendant is irrelevant to the application of the Double Jeopardy Clause.[4] The government may not circumvent a defendant's constitutional protection from multiple punishment by labeling a punitive proceeding as "civil." *See Halper*, 490 U.S at 447 n.7 ("in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes

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[3] U.S. Const. amend. V: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."

[4] *See United States v. Stoller*, 78 F.3d 710, 715 (1st Cir.) ("[A]s long as a civil sanction constitutes punishment . . . it does not matter if the 'multiple' punishment . . . precedes the attempt to impose the sanction, or conversely, if the sanction precedes the attempt to convict the defendant."), *cert. dismissed*, 117 S. Ct. 378 (1996); *United States v. Sanchez-Escareno*, 950 F.2d 193, 200 (5th Cir. 1991) ("[T]he *Halper* principle that a civil penalty can be factored into the double jeopardy matrix should apply whether the civil penalty precedes or follows the criminal proceeding."); *United States v. Bizzell*, 921 F.2d 263, 266-67 (10th Cir. 1990); *United States v. Mayers*, 897 F.2d 1126, 1127 (11th Cir. 1990). This Court left this particular question open in *Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 781 n.21 (1994). In dissent, Justice Scalia stated that if the claim is for multiple punishment, the "order of punishment cannot possibly make any difference." *Id.* at 804 (Scalia, J., dissenting).

actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated"); *see also United States v. La Franca*, 282 U.S. 568, 573 (1931) ("The term 'penalty,' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution.").

When a civil statute is utilized to effectuate society's goals of retribution and deterrence, a subsequent criminal prosecution subjects a defendant to multiple prosecutions and punishments. In a prior opinion in the case at bar, *United States v. Hudson*, 14 F.3d 536, 540 (10th Cir. 1994) ("*Hudson I*"), the Tenth Circuit correctly read *Halper* to this effect, recognizing that to the extent that the purpose and application of a penalty serve to deter unlawful conduct, the penalty is necessarily punitive. The court quoted *Halper*, which held that "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." *Hudson I*, 14 F.3d at 540 (citing *Halper*, 490 U.S. at 448-49); *see also Austin v. United States*, 509 U.S. 602, 610 (1993). The Tenth Circuit correctly stated in *Hudson I* that:

> if a particular remedial sanction can only be understood as also serving punitive goals, then the person subjected to the sanction has been punished despite that fact that the sanction is also remedial. To conclude otherwise effectively invalidates the Double Jeopardy Clause by allowing multiple punishments for the same conduct merely because the punishments also serve remedial purposes.

Hudson I, 14 F.3d at 540. Fundamentally, therefore, if a sanction effects deterrence and retribution, it is punishment for double jeopardy purposes.[5]

Whether a sanction is civil or criminal is primarily a question of statutory construction; however, this Court has repeatedly recognized that "a civil label is not always dispositive," and the legislature's characterization of a sanction as civil will be rejected when there is clear proof that the statute is "so punitive either in purpose or effect as to negate" the government's intent to label the punishment "civil." *Kansas v. Hendricks*, 1997 WL 338555, at 7 (U.S. June 23, 1997) (internal quotations omitted); *see also Halper*, 490 U.S. at 447.

The civil monetary fines at issue in this case are generally labeled "civil," but there are at least five strong indications of punitive intent by the legislature. First, the text of the penalty provisions, 12 U.S.C. §§ 93(b), 504, each provide that the Office of the Comptroller of the Currency ("OCC") "shall" impose a penalty of not more than $1,000 per day for certain violations of law. By linking the payment of a penalty to the commission of a crime, the legislature strongly indicated its "penal" intent. *Kurth Ranch*, 511 U.S. at 781 (citing *United States v. Constantine*, 296 U.S. 287, 295

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[5] *See United States v. La Franca*, 282 U.S. 568, 573 (1931); *United States v. Chouteau*, 102 U.S. (12 Otto) 603, 611 (1881) ("[the] character [of a money penalty] is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution"); *accord United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 116 S. Ct. 2106, 2110-11 (1996).

(1935)); *see also Austin*, 509 U.S. at 619-20.[6/] Second, the monies recovered under the statute are paid to the Treasury of the United States, not to the supposedly injured banking institutions, *see* 12 U.S.C. §§ 93(b)(8), 505(7), suggesting that the purpose is not remedial in nature. Third, injured persons and institutions may recover "all damages" from officers and directors under specific remedial provisions in the same statute. *See* 12 U.S.C. §§ 93(a), 503. Fourth, the banking statute at issue requires a finding of *scienter* (*i.e.*, that defendants knowingly committed banking violations). *See* 12 U.S.C. §§ 93(b), 1818(e),(i). In determining whether a sanction is punitive, this Court has stated that the existence of a *scienter* requirement and strong retributive and deterrent objectives indicate that a sanction is "punishment." *See Hendricks*, 1997 WL 338555, at 7-8.[7/] Fifth, the relevant

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[6/] The indictments against the Petitioners for violations of 18 U.S.C. §§ 2, 371, 656, & 1005 are based on the same conduct as the civil banking law violations.

[7/] In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), the Court listed the following factors in considering whether a sanction is penal or regulatory:

> [w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. . . .

Id. at 168-69 (footnotes omitted).

statutes do not calculate the amount of the fine on the basis of remedying any harm the government may have suffered or the reimbursement of investigative costs. To the contrary, the amount of the fine is determined in accord with a "civil" penalty matrix, which considers far more than any injury or costs imposed on the government by any acts of defendants.[8/] These five factors are all inconsistent with the remedial purpose suggested by the government and the court below in *United States v. Hudson*, 92 F.3d 1026 (10th Cir. 1996) (*"Hudson II"*).[9/]

The same fundamental features which led this Court to conclude that the tax in *Kurth Ranch* constituted punishment apply to the fines at issue here. In its initial action seeking civil fines against Petitioners, the government did not claim that it sought either recompense for any harm it suffered or

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[8/] *Hudson I* stated the factors that are utilized in the matrix:

> The amounts of money that may be assessed [under the statutes] is stated in terms of the number of days that each violation continues. In addition, both statutes require the OCC to take into account the financial resources and good faith of the person against whom sanctions are sought, the gravity of the violation, the history of previous violations, and any other factors that justice may require, in determining the appropriate sanction to impose.

Hudson I, 14 F.3d at 542 (citation omitted).

[9/] *See also Kurth Ranch*, 511 U.S. at 774 (finding that a drug tax was punitive because the tax was imposed on criminals only; the aims of the drug tax law were the same as those of criminal statutes; the drug tax applied to behavior that was already a crime; the tax allowed for sanctions by restraint of the defendant's property; imposition of the tax required a finding of intent; and the tax appeared excessive).

reimbursement of any investigative costs. Instead, the civil proceeding was imbued with the criminal goals of retribution and deterrence.[10/]

When the government itself has not been harmed, as here, the punitive nature of civil monetary fines is even more apparent. *Halper* established the following rule for cases in which the government seeks recovery for an injury:

> [w]here a defendant previously has sustained a criminal penalty, and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the

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[10/] Petitioners had a strong interest in resolving any risk of punishment in the "civil" proceeding. The Double Jeopardy Clause, which is meant to protect Petitioners' right to finality, was:

> designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957); *see also* Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 PA. L. REV. 101, 135 (1995).

Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.

Halper, 490 U.S. at 449-50. Because the government in this case did not sustain an injury, the civil monetary fines are not related to any goal of compensating the government, but rather the fines constitute punishment. *See id.*

Civil monetary fines retained by the government when it was not the victim of unlawful conduct cannot be justified *post hoc* as reimbursement of costs.[11/] The Tenth Circuit improperly allowed this result in *Hudson II*. In the proceedings below, the government made a rough approximation of the percentage of two government employees' time that was spent working on the underlying investigation, and equated those portions of the employees' salaries to an approximation of the government's costs. But the fines in this case had not originally been calculated by assessing the government's costs, rather the fines were imposed after a negotiated settlement, and the original amount sought by the government was based on the applicable federal statute.[12/] Once the government realized

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[11/] The fact that the fines here were negotiated downward to an amount that does not appear excessive is not relevant to the nature of the fines. *See Kurth Ranch*, 511 U.S. at 780 (noting that the amount of the tax is not dispositive); *Halper*, 490 U.S. at 452 (stating that "a money sanction can be reasonably related to one's violations and still be used as punishment"). Reasonableness of the fines only becomes an issue if the government alleges a precise injury. *See Hudson I*, 14 F.3d at 543.

[12/] If the government can justify a fine as reimbursement for investigatory costs, then it may be tempted to define "costs" very broadly, as it did in this case. The primary purpose of civil monetary fines is clearly not to reimburse the government for its costs, but to deter and

that it had to produce evidence of investigatory costs to attempt to justify the civil fines as remedial, it invented the "rough approximation" described above. Such a *post hoc* rationalization is not legitimate and should not be upheld by this Court. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("[C]ourts may not accept . . . counsel's *post hoc* rationalizations for agency action."). Congress may choose to authorize recovery of investigative costs, but until it does so expressly, the government's costs cannot be shifted to private parties. *See Missouri v. Hunter*, 459 U.S. 359, 366 (1983) (stating that a court cannot impose a sanction not authorized by the legislature).

This Court should adopt the Seventh Circuit's approach in holding that an *ex post facto* finding that a fine approximates the government's cost of investigation is not sufficient to alter the punitive nature of the fine. *See S.A. Healy Co. v. OSHA*, 96 F.3d 906 (7th Cir. 1996) (prohibiting the criminal prosecution of defendant company that had already paid civil fines for violations of the law involving the same conduct). The *Healy* court, in determining that the civil statute imposed a punitive sanction, looked to the factors that the agency considered in determining the amount of the civil fine, including the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations. *Id.* at 909. The court also noted that consideration of loss to the government or costs of investigation or prosecution were not among the factors to be

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punish the sanctioned party. *See Hicks v. Feiock*, 485 U.S. 624, 633 (1988) (an indeterminate sanction looking to the future is a civil remedy while an "unconditional penalty is criminal in nature because it is 'solely and exclusively punitive in character'") (quoting *Penfield Co. v. SEC*, 330 U.S. 585, 593 (1947)).

considered. *Id.* The court went on to state that where the government is not a victim, a fine cannot be justified as a remedy. *Id.* at 910. The private citizens who were victims of the defendant's misconduct were free to pursue their own private causes of action for damages as a remedy.[13/] When fines are not to be used to compensate the victim but instead serve the purposes of general and specific deterrence — criminal law objectives — the fines are punitive. *Id.* A contrary holding would lead to "multiplying costs of the investigations . . . justify[ing] still more proceedings and the imposition of additional fines" for the same offense. *Id.*

Because the civil monetary fines in this case are patently punitive and their imposition amounts to punishment, allowing the government to initiate a criminal proceeding following the imposition of such "civil" penalties would be inconsistent with the Double Jeopardy Clause.

B. The Simultaneous Imposition Here of Non-Participation or Debarment Sanctions Demonstrates that the Civil Monetary Penalties Are Not Remedial

Apart from making the government whole through reimbursement of costs of investigation and payment of damages incurred by the government, the sole remaining remedial goal the government should be allowed to pursue

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13/ If this Court holds, as it should, that the government cannot seek in successive proceedings both punitive civil and criminal sanctions against a defendant, the right of the government or a private party to seek compensation or other remedial relief when it has been the victim of the defendant's unlawful conduct would not be affected. Only multiple punitive sanctions are barred by the Constitution.

against Petitioners is to protect the integrity of the banking system and the interests of depositors.[14/] That remedial goal is completely satisfied by the administrative non-participation or debarment sanctions imposed on Petitioners. Supplementing those administrative debarments with civil monetary fines having no relationship to the government's costs and damages serves solely a punitive purpose.

Here, Petitioners were subjected to lifetime bars from the banking business, as well as civil monetary penalties. Despite the Tenth Circuit's holding in *Hudson I* that such debarments were "solely remedial," 14 F.3d at 542, comparable administrative suspension or bar orders have been deemed "punitive" as well as remedial.[15/] Amicus NACDL believes the debarments here were penal as well as remedial.[16/] However, assuming *arguendo* the correctness of

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[14/] *Hudson I*, 14 F.3d at 541-42 ("[T]he OCC's use of debarment as a means of protecting the integrity of the banking system and the interests of the depositors is a legitimate remedial purpose that need not necessarily be defined as also serving as deterrence or retribution.").

[15/] *See, e.g., In re Ruffalo*, 390 U.S. 544, 550 (1968) ("Disbarment, designed to protect the public, is a punishment or penalty imposed upon the lawyer."); *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996) (six month broker-dealer suspension held to be "punitive"); *Collins Sec. Corp. v. SEC*, 562 F.2d 820, 825 (D.C. Cir. 1977) (securities law broker-dealer debarment held to be "punitive"; "Disbarment or suspension [of an attorney] is equivalent to the penalty imposed on Collins by the SEC here."); *Beck v. SEC*, 430 F.2d 673, 674 (6th Cir. 1970) (four month broker-dealer suspension held to be "punitive, not remedial").

[16/] When a person is barred for life from a profession, the sanction is punitive as well as remedial because it is not based on a finding that the person is not competent currently. Numerous professions require professional licenses, and permanent or long term debarment from a

the Tenth Circuit's finding that the debarments in this case were solely remedial, administrative debarment *plus* civil monetary penalties here certainly constitute punishment because the debarments alone serve all the remedial purposes the government is entitled to pursue; the additional fine is wholly punitive. If the integrity of the banking industry and the protection of depositors are satisfied by the debarment of Petitioners, there is no rational reason for the government also to fine them (in the absence of governmental harm) except to punish them. The monetary fine in no way remedies harm to depositors or damage to the banking industry. Upholding the punitive civil fine and allowing subsequent criminal prosecution for the same underlying

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profession has in many instances more punitive effects on a person's life than would a brief period of incarceration or a monetary fine. *See Ex Parte Burr*, 22 U.S. (9 Wheat) 529, 529-30 (1824) ("[T]he profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise."). When debarments are long term or permanent and not based on a finding of unfitness, then they are punitive and should constitute punishment for double jeopardy purposes. *See also* Securities Exchange Act of 1934, Release No. 34-34720 (Sept. 26, 1994), 57 SEC Docket 1710 (stating that with regard to the SEC's policy regarding the imposition of bars from the security industry that are for an unspecified amount of time (*i.e.*, unqualified bars), an unqualified bar does not allow for re-application at some later date, but instead that an unqualified bar is a permanent exclusion from the securities industry).

In *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996), the court found a six month broker-dealer suspension under the federal securities laws was a penalty even though it also may have served a remedial purpose. The court found that Johnson's suspension "would less resemble punishment if the SEC had focused on [her] current competence or the degree of risk she posed to the public." *Id.* at 489. Because the SEC did not prove Johnson posed any current risk to the public, her suspension obviously was not grounded in an effort to protect the public from future harm due to professional unfitness. Therefore, the suspension was punitive.

conduct is inconsistent with the Double Jeopardy Clause and should not be sanctioned here.

II. THE MODERN BLURRING OF THE DISTINCTION BETWEEN CRIMINAL AND CIVIL PROCEEDINGS MUST NOT DILUTE THE HISTORIC PROTECTION OF THE DOUBLE JEOPARDY CLAUSE

Dissatisfied with the frequency or efficacy of criminal prosecutions by the Department of Justice of a variety of white-collar or business crimes in the past 25 years, Congress has embarked on a modern trend of granting federal administrative agencies and departments statutory authority to seek civil or administrative monetary sanctions for statutory violations that also may be subject to parallel criminal prosecution by the Department of Justice.[17/]

[17/] The blurring of the traditional civil-criminal distinction in federal law enforcement and the federal regulation of business, and the problems engendered thereby, has been the subject of much recent academic literature. *See, e.g.*, Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991) (arguing that legislative intent should be the primary determinant of whether a proceeding is civil or criminal); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992) (advocating a three-tier legal system, which would be comprised of criminal proceedings, civil proceedings seeking punitive sanctions, and civil proceedings seeking remedial sanctions, and arguing for an increase in civil-punitive sanctions as a replacement for many criminal proceedings); John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models — and What Can Be Done About It*, 101 YALE L.J. 1875 (1992) (responding to Mann article, and arguing that increased enforcement of punitive sanctions by administrative agencies has resulted in overcriminalization of conduct); Carol S. Steiker,

Congress in recent years has empowered a conglomeration of federal administrative agencies and departments to seek more punitive civil sanctions for a variety reasons.[18/] Thus, in

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Foreword to Twenty-Sixth Annual Review of Criminal Procedure: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide, 85 GEO. L.J. 775 (1997) (arguing that courts should focus on a definition of "punishment" that should not depend on procedural protection at issue, and advocating use of factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

[18/] *See* Mann, *supra* note 17, at 1844-45. In analyzing the trend of adding civil monetary penalty provisions to federal regulatory statutes, Kenneth Mann rationalized why Congress chose in 1986 to give federal administrative agencies authority to impose administrative false claims penalties under the False Claims Act:

> In voting to secure these and other statutory changes, Congress acted in the belief that a large portion of the fraud detected escaped sanction because existing institutional structures were inadequate to respond to them. The federal criminal system was already overloaded with complex and serious cases, and expanding its capacity would have entailed heavy costs. The hybrid administrative penalty opened the way for more cost-efficient and streamlined methods for punishing criminals. It expanded the availability of sanctions for false claims and several other regulatory offenses, thereby increasing the deterrent powers of government agencies without enlarging the field of criminal law. This change reflected a growing belief that administrative agencies need direct enforcement powers that are similar but not identical to criminal prosecution. Congress gave "prosecutorial" powers to administrative agencies without making these agencies part of the criminal process. Equally important, lawmakers seem to have thought of the criminal process as somehow inappropriate for "less serious" cases. Most wrongdoers charged with white-collar

addition to the civil monetary penalties that can be sought by federal banking authorities under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (codified as amended in scattered sections of 12 U.S.C.), similar punitive "civil" monetary penalties can now be imposed administratively or be sought in federal court in civil actions by the Occupational Safety and Health Review Commission, the Securities and Exchange Commission, the Department of Health and Human Services, the Federal Communications Commission, the Internal Revenue Service, the Federal Trade Commission, the Commodity Futures Trading Commission, the Environmental Protection Agency, and the Department of Agriculture, among other agencies and departments.[19/]

> offenses, it was thought, could be sanctioned effectively by a "civil" process, even though their actions amounted to statutorily defined crimes.

Id. at 1850 (footnotes omitted).

[19/] The Occupational Safety and Health Review Commission ("OSHRC") may impose civil fines for violations of the Occupational Safety and Health Act ("OSHA"), 29 U.S.C. § 666; the Securities and Exchange Commission ("SEC") may seek treble civil monetary penalties for insider-trading violations, pursuant to the Insider Trading and Securities Fraud Enforcement Act of 1988, 15 U.S.C. § 78u-1(a)(3); the Department of Health and Human Services ("HHS") may impose civil monetary fines for federal health care program fraud pursuant to the Civil Money Penalties Law of 1981, 42 U.S.C. § 1320a-7a; the Federal Communications Commission ("FCC") may impose civil fines for violations of FCC regulations pursuant to 47 U.S.C. § 203; the Internal Revenue Service ("IRS") may impose penalties for tax violations such as failure to file, 26 U.S.C. § 6677, and for aiding and abetting understatement of tax liability, 26 U.S.C. § 6701; the Federal Trade Commission ("FTC") may recover civil penalties for violations of rules regarding unfair or deceptive practices, pursuant to 15 U.S.C. § 45(m);

White collar crimes generally require more investigation than other crimes. Administrative agencies bring both more investigative resources and more expertise in the substantive conduct to bear on law enforcement's efforts to deter illegal behavior. Criminal procedural protections contained in the Fifth and Sixth Amendments of the Constitution generally are not required in civil/administrative proceedings. Evidentiary burdens are lighter in civil/administrative cases than in criminal proceedings because administrative agencies must only prove their cases by a preponderance of evidence rather than beyond a reasonable doubt. Further, at least one commentator argues that federal agencies tend to have home court advantage before administrative law judges, unlike Article III judges, who arguably may be more objective.[20/]

In addition to the punitive banking law sanctions at issue

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the Commodity Futures Trading Commission ("CFTC") may impose penalties under the Commodity Exchange Act, 7 U.S.C. § 6; the Environmental Protection Agency ("EPA") may impose civil penalties under a myriad of statutes, including, among others, violations of the Clean Water Act, 33 U.S.C. § 1319, and the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6928; and the Department of Agriculture may impose civil fines (*e.g.*, for violating statutes regarding marketing quotas of tobacco, 7 U.S.C. § 1314, and peanuts, 7 U.S.C. § 1359). In 1979, one commentator calculated that there were 348 statutory civil penalties enforced by 27 federal departments and agencies. Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1438 (1979). As evidenced by the statutes cited above, the number of civil penalties available to agencies and federal departments has increased substantially since 1979.

[20/] *See* Coffee, *supra* note 17, at 1887-88 & n.38 (citing American Bar Association study finding that administrative law judges upheld SEC staff in 58 of 62 SEC administrative cases studied over five-year period).

in the case at bar, a pertinent example of the increase in availability of civil/administrative monetary penalties is in the securities area where Congress has authorized the SEC to seek treble monetary penalties against persons engaged in illegal insider-trading, and other designated monetary penalties against violators of securities laws generally.[21/] Congress passed expansive amendments to the federal securities laws authorizing a broad array of civil monetary penalties in 1984, 1988, and 1990. These civil monetary penalties supplement existing and newly expanded civil and administrative sanctions including administrative debarment or suspension orders, license revocations, injunctions, cease and desist orders, and disgorgement or restitution orders. The

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[21/] The Insider Trading Sanctions Act of 1984 ("ITSA"), Pub. L. No. 98-376, 98 Stat. 1264 (codified as amended at 15 U.S.C. §§ 78c, 78o, 78t, 78u, 78ff), established a treble damages penalty and the Insider Trading and Securities Fraud Enforcement Act of 1988 ("ITSFEA"), Pub. L. No. 100-704, 102 Stat. 4677 (codified at 15 U.S.C. § 78u-1(a)(3)), expanded liability for securities law violations. The same insider-trading violations are also punishable through the criminal penalty provisions of the Securities Exchange Act of 1934. *See* 15 U.S.C. § 78ff (providing for criminal penalties of up to $1,000,000 for individuals and imprisonment for up to 10 years). The Securities Enforcement Remedies and Penny Stock Reform Act ("Remedies Act") enacted in 1990 greatly expanded the number and type of punitive sanctions available to the SEC in administrative and judicial enforcement proceedings and established three tiers of penalties relating to the nature of the violation based upon the degree of culpability associated with the mental state of the defendant. Pub. L. No. 101-429, 104 Stat. 951 (1990) (codified as amended in scattered sections of 15 U.S.C.). Civil monetary penalties are available in federal district court for all violations of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisors Act, and the Investment Company Act. In addition, the SEC administratively can impose civil monetary penalties against broker-dealers and other regulated persons. None of the "civil" penalties provisions are tied to the costs of the underlying government investigations.

1984 Act was intended to provide punitive monetary penalties in addition to civil injunctions and disgorgement of illegal profits. The addition of significant "civil" fines, the SEC argued, was needed as a deterrent.[22/] After 1984, there were several high profile insider-trading cases, which prompted Congress to pass the 1988 Act, which authorized even stiffer "civil" penalties. During the hearings on the 1988 Act, law enforcement officials testified that they had been unable to pursue some insider-trading violations because of a lack of resources.[23/]

Congress clearly intended the pervasive and potentially large civil monetary penalties, such as the treble insider-trading penalties, to achieve traditional criminal law enforcement goals; that is, primarily to serve the punitive goals of deterrence and retribution rather than a solely remedial purpose such as recompense to victims or the government.[24/] In authorizing additional "civil" monetary

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[22/] H.R. Rep. No. 100-910, at 11 (1988) (*reprinted in* Gary Lynch & Arthur F. Mathews, INSIDER TRADING AND SECURITIES FRAUD ENFORCEMENT ACT OF 1988, at 44 (1989)).

[23/] *Id.* at 14-15 (*reprinted in* Gary Lynch & Arthur F. Mathews, INSIDER TRADING AND SECURITIES FRAUD ENFORCEMENT ACT OF 1988, at 47-48 (1989)).

[24/] *See* H.R. Rep. No. 98-355, at 2 (1983), *reprinted in* 1984 U.S.C.C.A.N. 2275 (stating that the "legislation provides increased sanctions against insider trading in order to increase deterrence of violations"); *id.* at 8, *reprinted in* 1984 U.S.C.C.A.N. 2281 ("The Committee believes the new penalty provided by the legislation will serve as a powerful deterrent to insider trading abuses."); *id.* at 13, *reprinted in* 1984 U.S.C.C.A.N. 2286 ("The Committee believes that providing the Commission with the power to seek a civil penalty for violations is the best way to accomplish the goal of deterring insider trading."); *id.* at 26,

penalties, Congress did not change the substantive law governing trading,[25/] but instead provided the SEC with a new "remedy" intended to punish violators to create a more meaningful deterrent against insider-trading. The strictly punitive nature of the "civil" fines is highlighted by the fact that, although the government sustains investigatory and prosecutorial costs, such costs are not factored into the penalty assessment. Further, the fines sharply contrast with the remedial sanction of disgorgement in that monies are paid to the Treasury rather than placed into a fund for the benefit of defrauded investors. Recompense may also be sought in a private action by a plaintiff who, unlike the SEC in seeking fines, must prove damages and reliance to recover against a defendant.[26/] Another characteristic of the "civil" fines, which reinforces that the aim of the fines is to punish wrongdoers, is that liability is imposed only upon a finding that the defendant acted with *scienter*.

The banking fines at issue here are much like the insider-trading penalties under the federal securities statutes. The banking fines here seek retributive and deterrent goals; they exceed the amount of any damage to the government; they require a finding of *scienter*; and the behavior to which the penalties apply already constitutes a crime. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

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reprinted in 1984 U.S.C.C.A.N. 2298 (John S. R. Shad, former chairman of the SEC, expressing the opinion that "[t]his amendment would create a formidable deterrent to illegal insider trading" and stressing the need for proportionality and culpability in assessing ITSA fines).

[25/] *Id.* at 11.

[26/] ITSFEA provided a new Section 20A private right of action to compensate those who are harmed by unlawful securities trading.

This Court should prevent the government's attempt to blur the distinctions between civil and criminal proceedings in this matter. To find otherwise would be to encourage federal agencies to continue to abuse their civil and administrative powers at the expense of defendants' constitutional rights. If bankers can be subjected to multiple punishments in successive civil/criminal proceedings, then successive multiple punishments will become the norm in SEC enforcement cases, as well as enforcement proceedings pursued by a conglomeration of federal administrative agencies and departments.

CONCLUSION

For the foregoing reasons, we respectfully urge the Court to reverse the judgment of the court of appeals.

Respectfully submitted,

LISA KEMLER
National Association of Criminal Defense Lawyers
108 North Alfred Street
P.O. Box 20900
Alexandria, VA 22313

ARTHUR F. MATHEWS
Counsel of Record
JANE L. MCCLELLAN
JAY V. PRABHU
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000
Counsel for Amicus Curiae National Association of Criminal Defense Lawyers

June 26, 1997

(9)

Supreme Court, U.S.
FILED
AUG 26 1997
CLERK

No. 96-976

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

JOHN HUDSON, LARRY BARESEL AND JACK BUTLER RACKLEY,
Petitioners,
v.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF 48 STATES AND TERRITORIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

BETTY D. MONTGOMERY
Attorney General of Ohio
JEFFREY S. SUTTON
State Solicitor
Counsel of Record
DAVID M. GORMLEY
Assistant Attorney General
30 E. Broad Street, 17th Fl.
Columbus, OH 43215
(614) 466-8980

JAN GRAHAM
Attorney General of Utah
CAROL CLAWSON
Solicitor General
MARIAN DECKER
Assistant Attorney General
160 E. 300 South, 6th Fl.
P.O. Box 140854
Salt Lake City, UT 84114
(801) 366-0180

Counsel for States and Territories

37 (9)

BILL PRYOR
Attorney General
State of Alabama

BRUCE M. BOTELHO
Attorney General
State of Alaska

TOETAGATA A. MAILO
Attorney General
American Samoa Government

GRANT WOODS
Attorney General
State of Arizona

WINSTON BRYANT
Attorney General
State of Arkansas

DANIEL E. LUNGREN
Attorney General
State of California

GALE A. NORTON
Attorney General
State of Colorado

JOHN M. BAILEY
Chief State's Attorney
State of Connecticut

M. JANE BRADY
Attorney General
State of Delaware

JO ANNE ROBINSON
Interim Corporation Counsel
District of Columbia

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

MICHAEL J. BOWERS
Attorney General
State of Georgia

MARGERY S. BRONSTER
Attorney General
State of Hawaii

ALAN G. LANCE
Attorney General
State of Idaho

JAMES E. RYAN
Attorney General
State of Illinois

JEFFREY A. MODISETT
Attorney General
State of Indiana

THOMAS J. MILLER
Attorney General
State of Iowa

CARLA J. STOVALL
Attorney General
State of Kansas

RICHARD P. IEYOUB
Attorney General
State of Louisiana

J. JOSEPH CURRAN, JR.
Attorney General
State of Maryland

FRANK J. KELLEY
Attorney General
State of Michigan

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

MICHAEL C. MOORE
Attorney General
State of Mississippi

HARDY MYERS
Attorney General
State of Oregon

JOSEPH P. MAZUREK
Attorney General
State of Montana

D. MICHAEL FISHER
Attorney General
Commonwealth of Pennsylvania

DON STENBERG
Attorney General
State of Nebraska

JOSE FUENTES-AGOSTINI
Attorney General
Government of Puerto Rico

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

JEFFREY B. PINE
Attorney General
State of Rhode Island

PHILIP T. McLAUGHLIN
Attorney General
State of New Hampshire

CHARLES M. CONDON
Attorney General
State of South Carolina

PETER VERNIERO
Attorney General
State of New Jersey

MARK W. BARNETT
Attorney General
State of South Dakota

TOM UDALL
Attorney General
State of New Mexico

JOHN KNOX WALKUP
Attorney General
State of Tennessee

DENNIS C. VACCO
Attorney General
State of New York

DAN MORALES
Attorney General
State of Texas

MICHAEL F. EASLEY
Attorney General
State of North Carolina

WILLIAM H. SORRELL
Attorney General
State of Vermont

ROBERT B. DUNLAP, II
Attorney General
Commonwealth of Northern
Mariana Islands

JULIO A. BRADY
Attorney General
U.S. Virgin Islands

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

RICHARD CULLEN
Attorney General
Commonwealth of Virginia

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

WILLIAM U. HILL
Attorney General
State of Wyoming

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CONSTITUTION

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MISCELLANEOUS

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STATEMENT OF *AMICI* INTEREST

Amici curiae States of Ohio and Utah, together with 46 other States and Territories, write in support of respondent to affirm the judgment below and in the process to ask the Court to reexamine *United States v. Halper*, 490 U.S. 435 (1989), which applied the double jeopardy clause of the Fifth and Fourteenth Amendments for the first time to multiple civil sanctions.

We do not make this request lightly. The Court understandably reconsiders its decisions only rarely, and even then only when time shows the case to be mistaken in its legal underpinnings and unworkable in practice. While the burden is high, we respectfully submit that *Halper* satisfies it, particularly since we do not ask the Court to abandon the conclusion of unconstitutionality in *Halper*, but rather "only" to "abandon" an analytical "approach that in practice is difficult to administer and which produces anomalous results." *Sandin v. Conner*, 115 S. Ct. 2293, 2300 n.5 (1995).

In applying the double jeopardy clause to civil sanctions, *Halper* established a new test for ascertaining whether a civil sanction was so pervasively punitive and stigmatizing as to warrant double jeopardy treatment. The *Halper* test is not supported by the text and history of the double jeopardy clause, as well as the case law construing the clause; it has been unworkable in practice and has generated an unprecedented amount of State-court litigation; and it has not even meaningfully advanced individual liberties in view of other restraints on government, such as the excessive fines and due process clauses. For these reasons and those elaborated below, we submit this *amici curiae* brief for the Court's consideration.

SUMMARY OF ARGUMENT

Halper merits reconsideration for three independent reasons. **First**, the decision mistakenly created a new, difficult-to-apply, and ultimately mistaken double jeopardy test for civil sanctions. Consistent with the text of the prohibition, which refers to twice putting individuals in "jeopardy" for the "same offense," the clause simply does not apply in the civil context. The only exception is where the sanctions are not in fact civil but criminal, *see United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984), and *United States v. Ward*, 448 U.S. 242, 248-49 (1980), in which case not just the double jeopardy clause but the full panoply of constitutional criminal-procedure protections restricts the government. Nor does the double jeopardy clause separately prohibit multiple punishments -- whether civil or criminal -- for the same offense. As *Missouri v. Hunter*, 459 U.S. 359 (1983), makes clear, a legislature may impose two or more punishments for the same offense in one proceeding. And, while the government may not twice punish an individual for the same offense in two proceedings, that follows from the multiple-proceeding restriction of the clause, not from a freestanding multiple-punishments prohibition.

Second, in the eight years since *Halper* was decided, the new doctrine has been difficult to apply, has been exceedingly burdensome on the States to litigate, and has generated considerable "confusion." *United States v. Dixon*, 509 U.S. 688, 711 (1993). It is doubtful whether any case citation from the last decade has generated more lower-court applications than *Halper*. The problem stems in part from language in the opinion, later repeated in *Austin v. United States*, 509 U.S. 602 (1993), that any and all civil sanctions escalate into criminal punishment if they cannot be explained "solely" on remedial, as opposed to deterrent or retributive,

grounds. 490 U.S. at 448. That places a high if not impossible burden on the States because most government sanctions serve a variety of goals, many of which cannot be neatly compartmentalized.

Halper also asks a lot of State legislators, judges and attorneys who earnestly wish to obey their oaths to follow the Constitution. Though reaching an intuitively-correct result, *Halper* creates a counter-intuitive inquiry. For the first time, the case abandons a legislative universe in which State laws fall into a civil or criminal camp, creating an in-between sanction that is part civil (because it still does not receive the traditional constitutional protections of a criminal proceeding) and part criminal (because it does receive the protections of the double jeopardy clause). Making matters more confusing is *Halper*'s refusal to overrule a series of cases that had long adhered to the traditional civil/criminal dichotomy and that had followed a straightforward test for ascertaining on which side of the line a law fell. Nor does *United States v. Ursery*, 116 S. Ct. 2135 (1996), solve this problem, as it simply halves the inquiry yet again into whether an *in personam* or an *in rem* proceeding was involved, with *Halper* governing the former but not the latter. Even the most well-meaning and capable of State lawmakers face a daunting task in navigating these doctrinal shoals.

Finally, while these burdens might well be justified if the new doctrine measurably advanced the individual liberties that the double jeopardy clause was designed to serve, *Halper* has not done so in any meaningful way. As an initial matter, it remains unclear why the traditional protection offered in this area -- an inquiry into whether the civil proceeding really ought to be treated as a criminal one -- does not address the concerns expressed in *Halper* and the facts of *Halper* itself. But even if not, even if the *Halper* civil sanction would still amount to a civil proceeding under the traditional test, other

protections more naturally lend themselves to the protection Mr. Halper sought. In particular, the excessive fines clause directly prevents the government from imposing grossly disproportionate fines, *see Austin v. United States*, 509 U.S. 602 (1993), while the due process clause prevents vindictive prosecutions, *see, e.g., United States v. Goodwin*, 457 U.S. 368 (1982).

In the end, the *amici* States do not quibble with the result in *Halper*. They just disagree with the doctrinal changes in double jeopardy law that it announced together with the confusion these changes have spawned.

ARGUMENT

I. The Double Jeopardy Clause Does Not Proscribe Civil Sanctions Or Multiple Punishments.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . *nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb*; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

U.S. Const., amend. V (emphasis added).

Wedged between the grand jury clause (limited to any "capital and otherwise infamous crime") and the self-incrimination clause (applicable to "any criminal case"), the double jeopardy clause prevents the government from putting a person "in jeopardy of life or limb" more than once for the

"same offense." The "core . . . area protected" by the clause (*United States v. Scott*, 437 U.S. 82, 96 (1978)) has long been the citizen's right not to be tried twice for the same criminal charge. *United States v. Wilson*, 420 U.S. 332, 343 (1975). *See Schiro v. Farley*, 510 U.S. 222, 230 (1994) ("The prohibition against multiple trials is the controlling constitutional principle") (internal citation omitted).

Prior to *Halper*, the Court's double jeopardy holdings all adhered to the clear import of the clause's context and language: It concerned criminal, not civil, cases, *see United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548-49 (1943) ("[o]nly" "criminal punishment" "subject[s] the defendant to 'jeopardy' within the constitutional meaning"), and dealt with the risk of two prosecutions, not the fact of two sanctions. *See Breed v. Jones*, 421 U.S. 519, 528 (1975) ("Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution"); *Serfass v. United States*, 420 U.S. 377, 391 (1975) ("Both the history of the Double Jeopardy Clause and its terms demonstrate that it does not come into play until a proceeding begins before a trier having jurisdiction to try the question of the guilt or innocence of the accused") (internal quotation omitted).

A. Before *Halper*, The Court Treated Civil And Criminal Cases Differently.

In accordance with this understanding, two general inquiries governed double jeopardy challenges to civil sanctions before *Halper*. In the first stage, courts looked at the legislative design: Did the legislature authorize the sanction and did it treat the proceeding as a criminal or civil one? In the second stage, courts looked to "'whether the statutory scheme was so punitive either in purpose or effect as to negate' Congress' intention to establish a civil remedial

mechanism." *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984) (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)).

In the half century before *Halper*, the Court applied this test in a series of cases involving civil sanctions that allegedly created double jeopardy bars. In the first of these cases, *Helvering v. Mitchell*, 303 U.S. 391 (1938), the Court considered whether a civil sanction (a 50% penalty on top of the government's actual losses) could be obtained from a defendant who had earlier been acquitted on criminal charges arising from the same conduct. Reasoning that the question was whether the later civil proceeding was "essentially criminal" in nature and therefore an attempt to prosecute criminally a second time, *id.* at 398-99, Justice Brandeis wrote that "Congress may impose both a criminal and civil sanction in respect to the same act or omission," *id.*, and properly could do so in that case. At the same time, he recognized an outer limit to the legislature's drafting authority -- that "Congress may not provide civil procedure for the enforcement of punitive sanctions." 303 U.S. at 402.

United States ex rel. Marcus v. Hess, 317 U.S. 537, 549-51 (1943), followed the same course. It held that double jeopardy did not bar a monetary penalty nearly three times the amount of the government's losses, even though the defendants had previously been convicted of defrauding the government. In doing so, the Court acknowledged that "'[p]unishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrongdoer is concerned,' but this is not enough to label it as a criminal statute." *Id.* at 551 (quoting *Brady v. Daly*, 175 U.S. 148, 157 (1899)). Recognizing the latitude that legislatures need to draft remedial statutes, the Court acknowledged the "inherent difficulty of choosing a proper specific sum which would give full restitution." *Id.* at 552.

The Court reached a like result in *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956), upholding a civil sanction -- in the amount of a $2,000.00 fine for each of five counts of fraud, plus double damages and costs -- despite the defendant's earlier criminal conviction. The civil remedy, the Court noted, "merely accomplishes the intended result of Congress by authorizing a separate proceeding for the recovery of a lump sum in damages." *Id.* At the same time, the Court again recognized that there was an outer limit: A civil remedy could not be "so unreasonable or excessive that it transformed what was clearly intended as a civil remedy into a criminal penalty." *Id.* at 154. *Rex Trailer* also reemphasized that the government need not establish accountings of its damages in order to enforce a civil remedy: "It is insisted, however, that the failure of the Government to allege specific damages precludes recovery here. But there is no requirement, statutory or judicial, that specific damages be shown." *Id.* at 152-53. As the Court acknowledged, damages frequently may be "unmeasurable," and "the fact that no damages are shown is not fatal." *Id.* at 153.

Lastly, in *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984), the Court upheld a civil forfeiture following a gun owner's acquittal on criminal charges related to firearm sales without a license. In considering whether the civil action was "intended to be, or by its nature necessarily is, criminal and punitive, or civil and remedial," *id.* at 362, the Court hewed to the two-step inquiry: (1) "'whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other,'" and (2) "'whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.'" *Id.* at 362-63 (quoting *United States v. Ward*, 448 U.S. 242, 248 (1980)). In the end, the Court concluded, "only the clearest proof that the

purpose and effect of the forfeiture are punitive will suffice to override Congress' manifest preference for a civil sanction." *Id.* at 365 (citation and quotation omitted).

In all four cases, the Court initially looked to the language of the statutes to determine whether the legislature meant to create a civil remedy and whether it had plainly authorized the sanction. This of course accords with due process principles of notice. Next, even assuming the legislature had authorized such a sanction, the Court asked if the statute was so stigmatizing as to rise to the level of a criminal statute -- or, as the Court put it most recently, "so punitive either in purpose or effect as to negate" the government's decision to label the punishment "civil." *Kansas v. Hendricks*, 117 S. Ct. 2072, 2082 (1997) (internal quotations omitted). In none of the cases did the Court hold that the double jeopardy clause applies to civil sanctions. At most, they merely assumed that if a civil sanction was sufficiently punitive, the law warranted the label of a criminal statute and what comes with it -- additional constitutional protections. But in that situation, the double jeopardy clause would be "the least of the state's problems" in view of the other criminal procedure safeguards it must provide. Amar, *Double Jeopardy Law Made Simple*, 106 Yale L.J. 1807, 1834 (1997).

B. Before *Halper*, The Court Had Never Held That Double Jeopardy Separately Bars Multiple Punishments.

Nor, prior to *Halper*, had the Court ever held that the risk-releasing language of the clause (freeing individuals from being "twice put in jeopardy") extends beyond serial prosecutions to restrict the imposition of more than one punishment. Several cases no doubt refer to, and seem to assume the possibility of, a multiple-punishment prong of the double jeopardy clause. *See, e.g., Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 804-05 (1994) (Scalia, J., dissenting); *Hess*, 317 U.S. at 553 (Frankfurter, J., concurring). But in each case the intermingling of the two concepts may simply be shorthand for the basic truth that the government may not twice punish an individual for the same offense in two proceedings. Yet that limitation follows from the multiple-proceeding restriction of the clause, not from a freestanding multiple-punishments prohibition.

At any rate, *dicta* suggesting the existence of a multiple-punishments bar is equally matched by *dicta* suggesting the opposite. Several cases forcefully state that the number of punishments that may be exacted for criminal activity is the prerogative of the legislature, and is not limited by the double jeopardy clause. *See, e.g., Ohio v. Johnson*, 467 U.S. 493, 499 (1984) ("protection against cumulative punishmen[t] is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature"); *Albernaz v. United States*, 450 U.S. 333, 344 (1981) ("the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed"); *Whalen v. United States*, 445 U.S. 684, 697 (1980) (Blackmun, J., concurring) ("The *only* function the

Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended").

Any doubt about the issue, moreover, was seemingly put to rest in *Missouri v. Hunter*, 459 U.S. 359 (1983). At stake in *Hunter* was whether the government could impose two or more punishments for the same offense in one proceeding. The lower court barred the multiple punishments due to "statements of this Court that the Double Jeopardy Clause also 'protects against multiple punishments for the same offense.'" *Id.* at 366 (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)). In reversing, the Court reasoned that the clause "is cast explicitly in terms of being 'twice put in jeopardy,'" which is why the clause has been "consistently interpreted" to prevent "'an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.'" *Id.* at 365 (quoting *Burks v. United States*, 437 U.S. 1, 11 (1978)). For these reasons, the Court concluded that "the Missouri Supreme Court has misperceived the nature of the Double Jeopardy Clause's protection against multiple punishments," and accordingly held that the clause does not prohibit multiple punishments in one proceeding. *Id.* at 366.

In light of *Missouri v. Hunter*, one might have thought that the multiple-punishments issue had been resolved. The alleged restriction did not apply at all to single proceedings, and was utterly superfluous in multiple proceedings in view of the pre-existing multiple-prosecution bar established by the clause.

C. *Halper* Erred In Striking An Allegedly Excessive Civil Sanction Under The Double Jeopardy Clause.

Yet *United States v. Halper*, 490 U.S. 435 (1989), established a new test for ascertaining the difference between criminal and civil sanctions, and applied the double jeopardy clause for the first time to multiple punishments. While the Court's concern about the government's overreaching in that case seems appropriate even today, *Halper's* answer to that problem disregarded the text and history of the clause and the case law decided under it.

Halper first parted ways with the traditional two-step analysis for examining whether a civil sanction implicates the double jeopardy clause, by looking first to whether the legislature intended to create a civil statute, then applying the *Ward* test for ascertaining whether the sanction was so pervasively punitive as to amount to a criminal statute. In abandoning that inquiry, *Halper* for the first time created a third type of statute, one that is neither civil (because it is sufficiently punitive to warrant double jeopardy protection) nor criminal (because it does not warrant the other protections given criminal proceedings). Compare *Helvering*, 303 U.S. at 399 ("The question for decision is thus whether the [statute] imposes a criminal sanction."). The opinion offers no justification for creating this hybrid category of offenses or for abandoning the normal inquiry in this area.

Nor does *Halper* offer a satisfactory explanation for applying the double jeopardy bar for the first time to a second punishment. The only case offered for this proposition was *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874). But the federal criminal statute under which the defendant had been convicted there permitted the trial court

to impose a jail term *or* a monetary fine, while the trial judge imposed both. *Id.* at 175-78. In holding that the trial judge acted improperly, the Court relied on both the double jeopardy and due process clauses. *Id.* at 170. The reference to double jeopardy, however, was far from necessary to the result, as all agreed then and have agreed since that due process prohibits deprivations of liberty in excess of that authorized by law. *See Williams v. Oklahoma*, 358 U.S. 576, 586 (1959) (rejecting due process challenge to sentence "which was within the range of punishments authorized for that crime by the law of the state").

No less lacking in support is *Halper's* conclusion that the framers meant to subject civil governmental actions to double jeopardy review. *See Halper*, 490 U.S. at 440. In prohibiting government from "twice put[ting]" individuals "in jeopardy" for the "same offense," the language of the clause focuses on the exposure to public denunciation and stigma associated with a criminal charge. An accused quite simply "must suffer jeopardy before he can suffer double jeopardy." *Serfass v. United States*, 420 U.S. at 393. And "[j]eopardy denotes risk," a concept that in "the constitutional sense . . . is traditionally associated with a criminal prosecution." *Breed v. Jones*, 421 U.S. 519, 528 (1975). *See Crist v. Bretz*, 437 U.S. 28, 34-36 (1978) ("jeopardy" protects defendant from repeated attempts "to convict"). The clause thus protects those who twice face the risk of punishment, not those who twice receive it. *See Schiro v. Farley*, 510 U.S. 222, 230 (1994) ("our cases establish that the primary evil to be guarded against is successive prosecutions: 'The prohibition against multiple trials is the controlling constitutional principle'") (citation omitted); *Missouri v. Hunter*, 459 U.S. at 365 ("We have consistently interpreted [the clause] 'to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.'") (citation omitted); *Department of*

Revenue v. Kurth Ranch, 511 U.S. 767, 804-05 (1994) (Scalia, J., dissenting) ("It is time . . . to acknowledge what the text of the Constitution makes perfectly clear: the Double Jeopardy Clause prohibits successive prosecution, not successive punishment"); *Simpson v. United States*, 435 U.S. 6, 19 (1978) (Rehnquist, J., dissenting) ("Certainly the language of the double jeopardy provision of the Fifth Amendment . . . has not the slightest application" to multiple punishment cases). Even the most accommodating method for discerning constitutional meaning cannot square the simple words of the text with a freestanding multiple-punishment bar.

Nor does *Halper's* contrary conclusion have a distinguished -- indeed even extant -- historical pedigree. "Both the history of the Double Jeopardy Clause and its terms demonstrate that it does not come into play until a proceeding begins before a trier having jurisdiction to try the question of the guilt or innocence of the accused." *Serfass*, 420 U.S. at 391 (quotation omitted). Before and after ratification of the Fifth Amendment, moreover, legislatures frequently provided civil and criminal sanctions for the same conduct. *See Hess*, 317 U.S. at 555-56 (Frankfurter, J., concurring) (legislation "providing two sanctions for the same misconduct, enforceable in separate proceedings, one a conventional criminal prosecution, and the other a forfeiture proceeding or a civil action as upon a debt, was quite common when the Fifth Amendment was framed by Congress," and the Framers of the Constitution "contemporaneously enacted and continued to enact legislation" of this type). *See Myers v. United States*, 272 U.S. 52, 174-75 (1926) (the First Congress "was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument").

II. *Halper* Has Been Unworkable In Practice.

Halper "was not only wrong in principle; it has already proved unstable in application," *United States v. Dixon*, 509 U.S. 688, 709 (1993), and has generated considerable "confusion," *id.* at 711 (internal quotation omitted). *See Sandin v. Conner*, 115 S. Ct. 2293, 2300 n.5. ("Our decision today only abandons an approach that in practice is difficult to administer and which produces anomalous results"). Two features of post-*Halper* double jeopardy law have generated particular confusion and litigation.

First, States must reconcile *Halper* with *Missouri v. Hunter*, which at first blush look like polar opposites. *Hunter* seems to create a presumption in favor of multiple punishments, merely asking the States to show legislative authorization (and notice) before imposing them. Yet *Halper* seems to create a presumption against multiple punishments, asking the States to justify their non-punitive nature before imposing them. In trying to resolve this tension, *Halper* says that *Hunter* remains good law if the multiple punishments were imposed in the same proceeding, but that *Hunter* does not apply if the multiple punishments were imposed in different proceedings. 490 U.S. at 450. The answer from the government's perspective, in other words, is to lump all civil and criminal sanctions in one hybrid proceeding, which would satisfy both *Hunter* and *Halper*.

Even assuming that these threads of analysis hold together and that they do not fray in the minds of most federal and State lawmakers, the final solution alters time-honored assumptions about government authority. Neither the States nor the federal government has ever imposed civil and criminal sanctions in one proceeding. And the prospect of doing so now raises a host of awkward questions.

From opening charge to judgment, criminal and civil proceedings operate under different procedural rules and different constitutional obligations. To take the most obvious examples under the Constitution, the states must comply with the right to a speedy trial, the right to be informed of the nature of the accusation, the right to confrontation, the right against self-incrimination, and the right to counsel under the Fifth, Sixth and Fourteenth Amendments, as well as the beyond a reasonable doubt and effective assistance of counsel rights of the Fourteenth Amendment. The rules of discovery, evidence, procedure and appeal for the two proceedings also differ markedly from one to the other, and different governmental agencies frequently bring the different actions.

What, then, would the States do in this situation? They could not try all of the sanctions together in one civil proceeding, lest they violate the defendant's constitutional rights with respect to the criminal charges. And they could not try all of the sanctions in one criminal proceeding, lest they violate the legislature's prerogative to establish civil proceedings for remedial sanctions. That leaves one option -- trying the two types of sanctions together in a hybrid proceeding.

But that is really no option at all. Such a hybrid proceeding would require the empanelling of two different juries, would presumably require two different sets of government lawyers, would lead to different evidentiary and discovery rulings concerning the same evidence and would turn on different burdens of proof. Not surprisingly, in light of these and other obstacles, our system of justice has never joined together civil and criminal actions in a single trial. *See, e.g., United States v. Millan*, 2 F.3d 17, 20 (2d Cir. 1993), *cert. denied*, 510 U.S. 1092 (1994); *United States v. One Single Family Residence*, 13 F.3d 1493, 1499 (11th Cir. 1994).

But even if these logistical hurdles could be overcome, what defendant could possibly want the double jeopardy protection that a hybrid proceeding would provide? If a criminal trial is traumatic, how much worse to combine it with another proceeding that adheres to different rules and that even the ablest attorney would be strained to follow. Surely the confusion generated by such a proceeding would make a defendant fairly wonder if the cure was not worse than the disease.

In the last analysis, *Halper*'s solution to the tension between it and *Hunter* is not tenable. The Constitution does not force States to sacrifice one constitutionally-permissible cause of action in order to assert another; and it does not compel States to join civil and criminal actions in a one-size-fits-all hybrid proceeding. Either *Halper* or *Hunter* must govern whether double jeopardy bars multiple punishments, but not both.

Halper has generated a second problem at the State level, a drawn-out battle over the standard for determining whether a civil sanction is remedial or not. In some places, the opinion describes the test in lenient terms -- as "a rule for the rare case," 490 U.S. at 449, as applicable only when the sanction is "overwhelmingly disproportionate," *id.*, and as applicable only when the sanction "bears no rational relation to the goal of compensating the Government for its loss," *id.* In other places, the opinion appears to establish a stringent test -- characterizing sanctions that "cannot fairly be said *solely* to serve a remedial purpose" as punitive, *id.* at 448 (emphasis added), and providing that sanctions "also serving either retributive or deterrent purposes" are improper, *id.*

Much like the parties to this case (compare Brief for Petitioners, 12, with Brief for the United States), State prosecutors and Attorney General offices have waged a series

of fights with criminal defendants over this language. The stakes are high in view of the sizeable difference between proving that a sanction has a "rational" remedial goal and proving that it is "solely" remedial. Because all sanctions, civil or criminal, serve deterrent purposes and because most can be characterized as serving retributive goals, these cases are difficult to litigate and often hard to defend.

The upshot has been constant State and federal court litigation over legislation that until 1989 was assumed to be perfectly acceptable. Whether it be reasonable fines, drivers' license suspensions, professional license suspensions, or administrative discipline in schools, prisons and government offices, the States have confronted a unique volume of litigation over the timing and legitimacy of these sanctions. While the burden of this litigation is difficult fully to quantify, a LEXIS search performed on August 18, 1997 produced 1,269 double jeopardy cases citing *Halper*.

Some examples of successful *Halper* defenses are worth highlighting. For example, several courts have blocked criminal prosecution after civil sanctions have been imposed, allowing the defendant to walk free with no criminal record and no criminal penalty. *See, e.g., United States v. Sanchez-Escareno*, 950 F.2d 193, 203 (5th Cir. 1991) ("If the defendants actually pay the civil fines, then any subsequent criminal prosecution would be double jeopardy"), *cert. denied*, 506 U.S. 841 (1992); *United States v. Sanchez*, 1990 U.S. Dist. LEXIS 20194, *18 (S.D. Tex. 1990) (finding that double jeopardy barred a smuggling prosecution following imposition of U.S. Customs Service fines of $232,000); *Mullett v. Miller*, 168 Ariz. 594, 597-98, 816 P.2d 251, 254-55 (Ariz. Ct. App. 1991) ("In the event that the administrative penalty is determined to be a punishment, the underlying criminal proceeding must be dismissed, to the extent that the charges are based on the same conduct that

was the basis of the [civil] proceeding"), *cert. denied*, 502 U.S. 1122 (1992); *State v. Hickham*, 1995 Conn. Super. LEXIS 1215, *16 (Conn. Super. Ct. 1995) (dismissing criminal case following imposition of administrative sanction); *People v. Shaughnessy*, 170 Misc.2d 765, 768, 650 N.Y.S.2d 961 (N.Y. Dist. Ct. 1996) (dismissing criminal fraud charges); *Wright v. State*, 112 Nev. 391, 916 P.2d 146, 153 (1996) (reversing defendant's criminal conviction because defendant had earlier paid a $30,000 civil fine); *State v. Osorio*, 1996 Tex. App. LEXIS 5630, *7 (Tex. Ct. App. 1996) (drug penalty against defendant precluded subsequent prosecution for drug possession); *Small v. Commonwealth*, 12 Va. App. 314, 402 S.E.2d 927 (Va. Ct. App. 1991) (en banc) (holding that imposition of civil contempt fines barred later criminal sanctions).

As a general matter, *Halper* also has been the basis for the invalidation of a wide range of civil sanctions. *See, e.g., Patel v. United States*, 1992 U.S. Dist. LEXIS 560, *9 (N.D. Ill. 1992) (holding that double jeopardy barred imposition of a fine where the defendant had already been convicted); *United States v. Hall*, 730 F. Supp. 646, 655 (M.D. Pa. 1990) (finding that assessment of civil fine where the defendant had already been convicted and fined violated the double jeopardy clause); *Kvitka v. Board of Registration*, 407 Mass. 140, 145-46, 551 N.E.2d 915, 918 (1990) (vacating fine imposed by medical licensing board following criminal conviction for illegal drug dispensing), *cert. denied*, 498 U.S. 823 (1990); *Winchester v. Stein*, 86 Wash. App. 458, 465, 937 P.2d 618 (Wash. Ct. App. 1997) (vacating $250,000 civil fine that went into the Washington Anti-Criminal Profiteering Revolving Fund because the fine was not designed solely to reimburse the State for its costs in the case).

III. Abandonment Of The *Halper* Analysis Will Not Measurably Diminish Protection From Prosecutorial Or Legislative Overreaching.

All of this might well be justified if *Halper* meaningfully curbed "governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 310 (1984) (citation omitted). But it is not clear that it has done so, or that it will do so in the future.

A. *Ursery* Limited *Halper's* Application.

To a large degree, the Court has already abandoned the *Halper* analysis and some of the problems it has generated. In *United States v. Ursery*, 116 S. Ct. 2135 (1996), the Court made clear that *Halper* does not govern double jeopardy challenges to *in rem* forfeiture proceedings, *id.*, and clarified that *Halper* does not require the government to show that sanctions are "solely" remedial in order to withstand a double jeopardy challenge, *id.* at 2145 n.2.

In light of *Ursery*, lower courts now apply two double jeopardy tests to civil sanctions. Forfeitures receive review under the traditional test: Did the legislature authorize the sanction and intend it to be imposed in a civil proceeding? And if so has the defendant established the "'clearest proof'" that the sanction is "so punitive in form and effect as to render [it] criminal despite Congress' intent to the contrary"? *Id.* at 2148 (quoting *Ward*, 448 U.S. at 249). Civil fines, however, still receive review under the modified *Halper* analysis: Does the sanction have a rational relationship to a remedial goal?

Ursery, then, both mitigates and magnifies the problems caused by *Halper*. Clarification of the *Halper dicta* no doubt will reduce much of the litigation in this area, and relegating *Halper* to civil fines will eliminate much of the litigation over forfeitures. Yet, even with these clarifications, the current state of double jeopardy law demands a lot of State prosecutors and judges, to say nothing of State legislators. *See Albernaz v. United States*, 450 U.S. 333, 343 (1981) (describing the pre-existing "veritable Sargasso Sea" of double jeopardy law "which could not fail to challenge the most intrepid judicial navigator"). There is nothing intuitive about applying a constitutional doctrine that calls for one test in the context of forfeitures and another in the context of fines, and that says a combined civil-criminal action (in either setting) eliminates the basis for any challenge at all.

B. After *Ursery*, It Is Not Clear What Additional Protection *Halper* Provides.

Nor, in light of *Ursery*, is it even clear what added protection *Halper* still provides. If the only thing *Halper* does is require States to establish a rational means-end fit for civil sanctions, it is unclear how the double jeopardy clause even adds to the inquiry. The due process and equal protection clauses of the Fourteenth Amendment already require State legislatures to adopt rational legislation. *See Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955); *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943). And the excessive fines, cruel and unusual punishment, and due process clauses already circumscribe over-zealous sanctions.

Under these circumstances, the stakes of preserving the *Halper* rule remain conspicuously narrow. The rule comes into play only where the sanction:

(i) does not constitute a forfeiture, in which case *Halper* already does not apply, *see Ursery*;
(ii) does not rise to the level of a criminal punishment, in which case the criminal procedure protections of the Fifth, Sixth and Fourteenth Amendments already protect the individual;
(iii) does not constitute an excessive fine or a cruel and unusual punishment, in which case the Eighth and Fourteenth Amendments already protect the individual, *see Kurth Ranch*, 511 U.S. 767, 797 (O'Connor, J. dissenting), *id.* at 803 n.2 (Scalia, J., dissenting);
(iv) does not constitute an irrational sanction, in which case the equal protection and due process clauses already protect the individual; and
(v) does not exceed the fine authorized by the State or federal legislature, in which case the due process clause already protects the individual.

We respectfully submit that the exceedingly modest gap in the panoply of individual liberty protections that *Halper*'s demise would create does not justify the doctrinal confusion it has generated in the lower courts.

C. The Excessive Fines And Due Process Clauses Provide A More Natural Framework For Curbing Excessive Fines.

With or without *Halper*, the Eighth Amendment already proscribes excessive fines. In contrast to the double jeopardy clause, whose "primary evil . . . is successive prosecutions," *Schiro v. Farley*, 510 U.S. 222, 230 (1994), the excessive fines clause has no other role to play in our constitutional system than to eradicate extravagant monetary penalties. For that reason, it is difficult to ascribe a state of mind to the drafters of the first eight amendments that would make sense out of placing in the Fifth, rather than the Eighth Amendment, the most potent limit on civil monetary sanctions that are "overwhelmingly disproportionate" to the damages caused. *Halper*, 490 U.S. at 449. Still less is it possible to do so for the people who ratified these amendments and had only the words of the provisions to go by.

Two post-*Halper* cases confirm that the clause offers the very sort of constitutional protection that the facts of *Halper* demanded. In *Browning Ferris v. Kelco Disposal*, 492 U.S. 257 (1989), the Court acknowledged that the government's recovery of monetary penalties in a civil proceeding raised Eighth Amendment concerns. *Id.* at 257 n. 21. Recognizing that the clause was intended by the Framers as a check against prosecutorial power, the Court held that it limited "only those fines directly imposed by, and payable to the government." *Id.* at 268. Although the Court was unwilling to extend Eighth Amendment protections to private litigants, it was careful not to "go so far as to hold that the excessive fines clause applies just to criminal cases." *Id.* at 263.

Austin v. United States, 509 U.S. 602 (1993), made express what *Browning-Ferris* hinted, namely, that the excessive fines clause limits civil sanctions imposed by the government. According to *Austin*, the critical inquiry is not whether a particular proceeding is criminal or civil, but whether it constitutes punishment. *Id.* at 610. To be sure, just as *Halper* purported to limit the consequences of its double jeopardy punishment inquiry to the "rare," or "overwhelmingly disproportionate," civil punishment, *id.* at 449, so too limitations imposed by the excessive fines clause remain limited to the rare, pervasively punitive, civil sanction. Still, the clause is not an empty restriction. Various lower courts have already used the clause to check a series of civil sanctions. *See e.g. United States v. Dean*, 80 F.3d 1535, 1539-43 (11th Cir. 1996); *United States v. One Single Family Residence Located at 18755 North Bay Road*, 13 F.3d 1493, 1498-99 (11th Cir. 1994); *United States v. Sarbello*, 985 F.2d 716, 717-18, 725 n.16 (3rd Cir. 1993); *United States v. Real Property Located at 6625 Zumirez Drive*, 845 F. Supp. 725, 737, 742 (C.D. Cal. 1994); *In Re Forfeiture of 1990 Chevrolet Blazer*, 684 So.2d 197, 199 (Fla. Ct. App. 1996), *review denied*, 695 So.2d 699 (Fla. 1997); *Thompson v. Grindle*, 113 Md. App. 477, 494-95, 688 A.2d 466, 474 (Md. Ct. App. 1997), *cert. granted*, 346 Md. 28, 694 A.2d 951 (1997); *State v. A House and 1.37 Acres of Real Property Located At 392 South 600 East*, 886 P.2d 534, 541 (Utah 1994).

Even assuming that the excessive fines clause fails to address each of the concerns outlined in *Halper*, the more flexible requirements of the due process clause provide a better safety valve for checking the occasional over-zealous prosecutor than the double jeopardy clause. As the Court has long recognized, and as the States well understand, the due process clause itself also places limits on government prosecutions. *See United States v. Goodwin*, 457 U.S. 368,

384-86 (1982) (due process prohibits prosecutors from bringing additional vindictive, retaliatory charges against a defendant who exercises his right to a jury trial in response to the original charge); *Blackledge v. Perry*, 417 U.S. 21, 28-29 (1974) (due process prohibits prosecutors from bringing more serious charges against a defendant in response to his invocation of a statutory right to appeal); *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969) (due process prevents a judge from imposing a higher sentence upon retrial to punish a defendant for appealing).

Taken together, the excessive fines and due process clauses also adequately address one of the underlying rationales for the *Halper* rule -- "the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding." 390 U.S. at 451 n.10. At one level, law breakers have little reason to object to collateral civil proceedings. They cannot tenably complain about a "legitimate expectation of finality" after the first proceeding (*Jones v. Thomas*, 491 U.S. 376, 385 (1989)) when the legislature has "prescribed in advance" dual civil and criminal sanctions for their misconduct. *Hess*, 317 U.S. at 355 (Frankfurter, J., concurring). But at another level, the defendants have every right to complain. The government may not engage in vindictive prosecution or impose fines that singly or cumulatively are grossly excessive. It is just that the due process and excessive fines clauses, not the double jeopardy clause, safeguard these rights. Compare Brief for the United States, at 26-28, *United States v. Ursery*, Nos. 95-345 and 95-346 (O.T. 1995).

In sum, while *Halper* has spawned a host of troubling questions concerning the proper scope of the double jeopardy clause, it has not even measurably advanced the protections covered by the clause. Instead of forcing government

attorneys under *Halper* to the unthinkable (lumping civil and criminal penalties into one proceeding), or to the unpredictable (leaving them guessing as to whether a second action may be pursued), the excessive fines and due process clauses more appropriately regulate these areas. They leave to legislatures the policy of defining crimes and setting punishments, without leaving defendants unprotected from grossly excessive penalties such as those once faced by Mr. Halper.

CONCLUSION

The *amici* States respectfully urge the Court to affirm the decision below and in the process to overrule the analysis, though not necessarily the result, of *United States v. Halper*, 390 U.S. 435 (1989).

Respectfully submitted,
BETTY D. MONTGOMERY
Attorney General of Ohio
JEFFREY S. SUTTON
State Solicitor
Counsel of Record
DAVID M. GORMLEY
Assistant Attorney General
30 East Broad Street, 17th Fl.
Columbus, Ohio 43215-3428
(614) 466-8980

JAN GRAHAM
Attorney General of Utah
CAROL CLAWSON
Solicitor General
MARIAN DECKER
Assistant Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 34114-0854
(801) 366-0180

COUNSEL FOR THE *AMICI* STATES

Date: August 26, 1997